

Indiana Law Review



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1999 SURVEY OF RECENT DEVELOPMENTS IN INDIANA LAW

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ARTICLE

**Beyond Dead Reckoning: Measures of Medical
Injury Burden, Malpractice Litigation, and Alternative
Compensation Models from Utah and Colorado**

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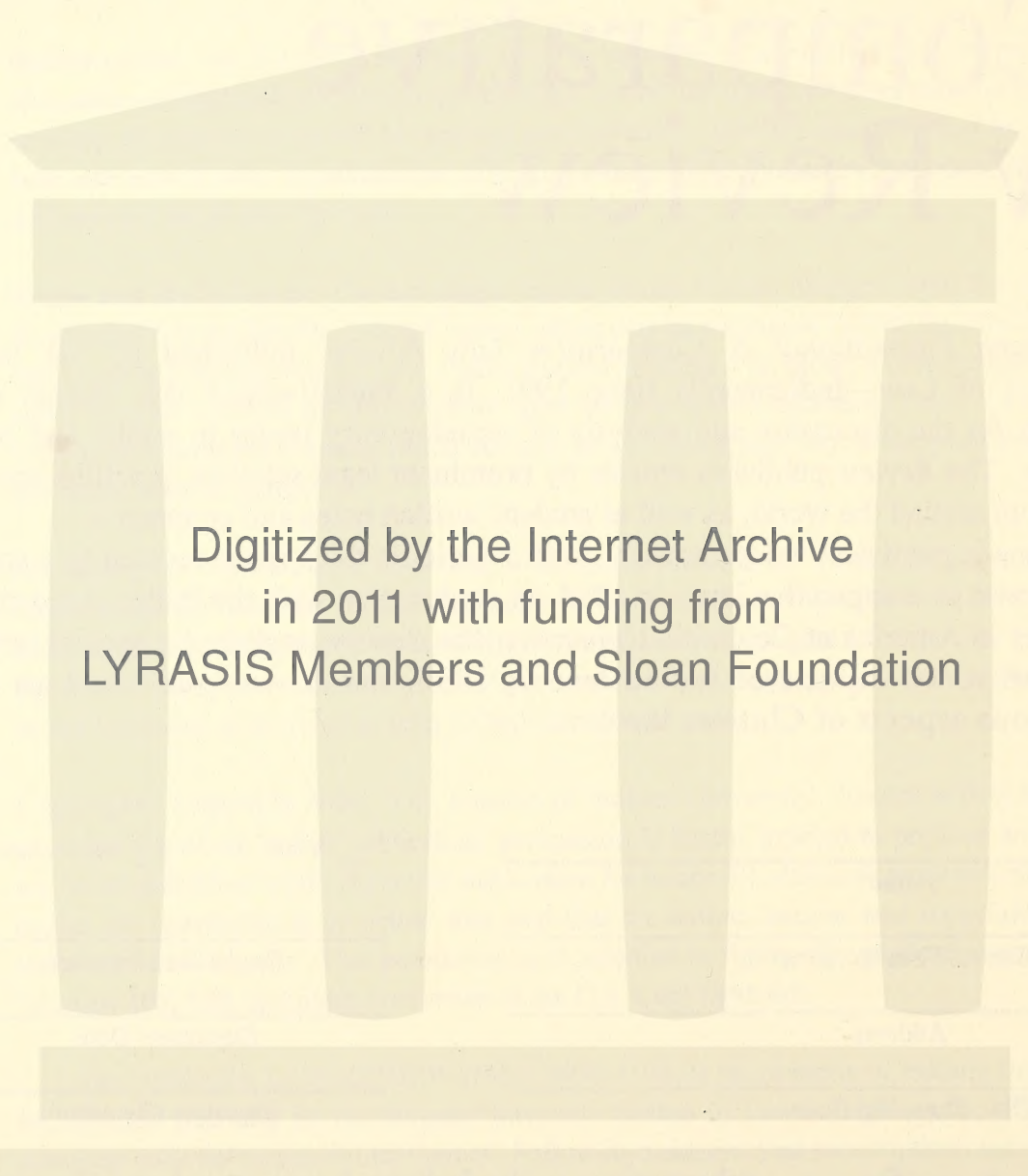
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WHY CHANGING THE SUPREME COURT'S MANDATORY JURISDICTION IS CRITICAL TO LAWYERS AND CLIENTS

RANDALL T. SHEPARD*

Business managers consistently stress how competent managers should conduct their oversight responsibilities: limit the number of direct reports. Leaders who seek to give daily direction to too many people are managers who do not have the time to think the larger strategic thoughts that make organizations run well.

The Indiana Supreme Court faces a predicament common to many managers at the head of large organizations. The current requirement of the Indiana Constitution that all criminal appeals of cases involving sentences of more than fifty years come directly to the Supreme Court from the trial court has shifted a substantial number of criminal appeals to the Supreme Court for initial review. These were previously handled very ably by the state's intermediate court. If the Supreme Court is to play well its role as the leader of the state's legal system, we must find a way to limit the number of "direct reports."

This fall, we will ask the voters of the state to amend the constitution to restore this capacity for leadership to the Indiana Supreme Court. I describe here why this is a good idea.

I. HOW WE GOT HERE

Alas, this is the second time in just a few years that we have asked the voters to solve more or less the same problem. A provision placed in the judicial article of the Constitution in 1970 gave persons who received a criminal sentence of more than ten years the right to appeal directly from the trial court to the Supreme Court.¹ More aggressive drug prosecutions, a renewed war on crime generally, and increases in statutory penalties led to mass increases in the number

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1. "The supreme court shall have jurisdiction, co-extensive with the limits of the state, in appeals and writs of error, under such regulations and restrictions as may be prescribed by law. It shall also have such original jurisdiction as the general assembly may confer." IND. CONST. art. VII, § 5, *amended on* Nov. 3, 1970. The provision now reads in relevant part: "The Supreme Court shall exercise appellate jurisdiction under such terms and conditions as specified by rules except that appeals from a judgment imposing a sentence of death, life imprisonment, or imprisonment for a term of greater than ten years shall be taken directly to the Supreme Court." *Id.*

of mandatory criminal appeals during the 1980s.²

This increase meant that nearly all other appellate business was squeezed into a small percentage of the court's time. As I stated in my 1988 address to the General Assembly, "The present ten-year rule has flooded the Supreme Court with criminal cases—93% of our opinions in 1986—and nearly forced off our docket the kinds of civil cases which bring most people to court: custody and child support, landlord/tenant disputes, tort law, and the like."³ The bench and bar proposed a constitutional amendment that raised from the ten years to fifty years the threshold for direct appeals. The legislature approved this proposal and placed it on the ballot for November 1988.

The Indiana State Bar Association provided strong support, particularly in educating the public.⁴ Local bar associations and judges did the same.⁵ There was no opposition to our proposal to amend the Constitution. The public voted "yes" by a wide margin.⁶

2. The following table illustrates the constraints placed upon the court by the direct appeal mandate:

<u>Year</u>	<u>Opinions</u>	<u>Direct Appeal Opinions</u>	<u>Civil Transfer Opinions</u>
		(%)	(%)
1986	445	395 (89%)	21 (5%)
1985	330	291 (88%)	22 (7%)
1984	327	280 (86%)	19 (6%)
1983	323	281 (87%)	24 (7%)
1982	224	285 (85%)	23 (7%)
1981	204	246 (81%)	38 (13%)
1980	270	226 (84%)	21 (8%)
1979	262	210 (80%)	21 (8%)
1978	275	234 (85%)	21 (8%)
1977	164	138 (84%)	12 (7%)
1976	165	137 (83%)	7 (4%)

Randall T. Shepard, *Changing the Constitutional Jurisdiction of the Indiana Supreme Court: Letting a Court of Last Resort Act Like One*, 63 Ind. L.J. 669 (1988).

3. Randall T. Shepard, *State of the Judiciary*, 31 RES GESTAE 353, 354 (1988).

4. See Randall T. Shepard, *Vote "Yes" on Proposition 2 or "I'm Sorry, But There's No Supreme Court Case on That,"* 32 RES GESTAE 56 (1988).

5. See Doug Haberland, *Chief Justice Makes Case for Proposition 2*, FORT WAYNE JOURNAL-GAZETTE, Sept. 28, 1988, at 1C ("The general populace doesn't have the access to the courts it deserves," said Wells Circuit Court Judge David L. Hanselman Sr.); James O. McDonald, *Prop 2 Is for Law-Abiding Citizens*, TERRE HAUTE TRIBUNE-STAR, Oct. 23, 1988, at C3 ("The Terre Haute Bar Association; Indiana Bar Association; Supreme Court Judges Shepard and Di[cks]on; Vigo County Judges Bolin, Brown, Eldred, Kite and McCrory; county political chairmen Robert Wright and Ruel Burns; Sheriff Jim Jenkins; Prosecutor Phil Adler; and Police Chief Gerald Loudermilk all have endorsed passage of Proposition 2.").

6. In 1998, 1,034,309 citizens voted for the amendment to article VII, section 5; only 153,640 voted against it. Secretary of State, *Indiana General Election 1998: Constitutional Amendments* (visited May 30, 2000) <http://www.state.in.us/serv/sos_elections?office=

The public adoption of the amendment permitted a substantial realignment of the court's docket. Instead of consuming ninety percent of the court's opinions, by 1992 criminal direct appeals accounted for only thirty-one percent.⁷ This change also gave the court the opportunity and energy to undertake all sorts of reform efforts, such as the writing and adoption of the Indiana Rules of Evidence⁸ and large-scale revisions to rules covering a host of other neglected areas. In January 1990, for example, the Indiana Supreme Court amended forty-two different rules of court, including parts of the Rules of Criminal Procedure, Appellate Procedure, Trial Procedure, Post-Conviction Remedies, Small Claims, Admission and Discipline, Professional Conduct, as well as the Administrative Rules and the Code of Judicial Conduct.⁹ Some may have regarded these changes as too aggressive; most practitioners thought we were making up for lost time.

This change in appellate jurisdiction worked rather well until the General Assembly changed the sentence for murder. During the 1994 session, the legislature passed conflicting statutes: one purported to change the presumptive term for murder from forty years to fifty years and the other purported to change it back to forty again.¹⁰ By the 1995 session, the legislature resolved this conflict by setting the standard penalty at fifty-five years.¹¹

Raising the standard sentence for murder to fifty-five years eventually caused an explosion in the number of direct appeals to the Supreme Court. The number of cases docketed in the court because the sentence was more than fifty years grew as follows:

Constitutional+Amendments>.

7. See Kevin W. Betz & Andrew T. Deibert, *An Examination of the Indiana Supreme Court Docket, Dispositions, and Voting in 1993*, 27 IND. L. REV. 719, 719 (1994) (58 criminal direct appeals and 185 opinions issued in 1992).

8. The Indiana Supreme Court adopted the Rules of Evidence effective January 1, 1994. See *Bryant v. State*, 660 N.E.2d 290, 310 n.23 (Ind. 1995).

9. The rules amended are: Indiana Trial Rules 42, 53.4, 54, 58, 59, 65, 72, 77, 85; Indiana Criminal Rules 11, 15, 16, 18, 19, 23, 24; Indiana Appellate Rules 2, 4, 8.2, 9, 17; Indiana Small Claims Rules 5, 8, 11, 15; Indiana Admission and Discipline Rules 2, 3, 6, 12, 13, 15, 16, 21, 25, 29; Indiana Administrative Rules 1, 2, 7, 8; Indiana Judicial Conduct Canon 7; Indiana Professional Conduct Rule 7.3; Indiana Post-Conviction Rule 1.

10. In 1994, the General Assembly twice amended IND. CODE § 35-50-2-3, which instructs a court on how to sentence a defendant convicted of murder. Compare Pub. L. No. 164-1994 with Pub. L. No. 158-1994. "The first amendment changed the presumptive sentence for murder in section 3(a) from forty to fifty years and reduced the possible enhancement time The second amendment allowed for the exclusion of mentally retarded individuals from the death of life imprisonment without parole sentencing option of section 3(b). . . . However, the second amendment did not incorporate the changes of the first amendment." *Smith v. State*, 675 N.E.2d 693, 695 (Ind. 1996). There were, in effect, two different Indiana Code sections 35-50-2-3, each with different presumptive sentences for murder. See *id.*

11. See Pub. L. No. 148-1995, § 4.

<u>Year</u>	<u>Criminal Direct Appeals</u>
1995	54
1996	82
1997	112
1998	97
1999	118

This expansion in direct appeals reflected the fact that most murder cases became direct appeals and earned a place on the docket of the Supreme Court, whereas formerly only those in which the sentence was fully enhanced or in which there was an habitual offender finding earned mandatory places on the Court's docket. The corollary, of course, was that there was less time available to hear the appeals of civil litigants or of criminals whose sentences were fifty years or less:

<u>Year</u>	<u>Total Civil</u> ¹²	<u>Criminal Transfer</u>	<u>Criminal Direct</u>	<u>Total Criminal</u> ¹³	<u>Total Crim + Civil</u>
1995	41 (38%)	29 (27%)	38 (35%)	67 (62%)	108 (100%)
1996	38 (31%)	25 (20%)	59 (48%)	84 (69%)	122 (100%)
1997	45 (27%)	27 (16%)	94 (57%)	121 (73%)	166 (100%)
1998	31 (23%)	17 (12%)	89 (65%)	106 (77%)	137 (100%)
1999	47 (27%)	24 (14%)	106 (60%)	130 (73%)	177 (100%)

The message of this chart is one of restricted access to justice. As I said to the legislature: "[O]nce again [it is] very difficult for parents or business people or injured Hoosiers (or for that matter appellants in criminal cases who got two-year sentences or 42-year sentences) to get a hearing on the merits in the Supreme Court."¹⁴

II. WHAT TO DO NEXT

It is unacceptable, that over the long term, the Indiana Supreme Court will be open only to those whose sentences are the highest and virtually closed to people with ordinary family and business legal problems. The legal turn of events that created the present predicament has just four solutions: a dramatic decline in the number of murders, a decision by the legislature to reduce the

12. Included in this number are civil direct appeals and civil transfers.

13. Included in this number are criminal direct appeals and criminal transfers.

14. Randall T. Shepard, *Indiana Courts as Servants of Their Communities*, 41 RES GESTAE, Feb. 1998, at 28, 33.

penalty for murder, an outbreak of trial court leniency on murders, or amending the constitution.

While most of these alternatives seem highly unlikely, there are a number of changes one might contemplate as partial solutions. After all, the challenge is one that high appellate courts have regularly faced in one way or another: a growing criminal caseload crowding out the other business. It has certainly been the history of our own state. When the Indiana Appellate Court was created in 1891, it had no criminal jurisdiction at all.¹⁵ By the time reformers were revising the judicial article in the 1960s, it seemed prudent to send the bulk of the criminal business to the Court of Appeals for initial review.

A state high court faced with a growing docket has at its disposal a relatively fixed list of tools. These tools afford some relief, but, as I shall argue, they are not adequate permanent solutions for the problem Indiana now faces.

A. *Work Faster*

To be sure, a court can simply work faster and turn out more opinions. When the crunch came in the mid-1980s, the Indiana Supreme Court issued record numbers of criminal opinions. In 1986, for example, the five members produced a total of 445 signed opinions.¹⁶ Similarly, the current Justices have done their best to increase the number of opinions issued on the merits. It has not been enough. As I said in my 1998 state of the judiciary address: "Last year the Supreme Court had its most productive year since 1991, issuing 30 percent more opinions than the year before, including moving a record number of death-penalty cases. And when we were done, we were farther behind than we were on Jan. 1."¹⁷

Moreover, this rapid-fire approach is necessarily fraught with the chance for error. During the 1980s, for example, the volume was so high that we adopted and reversed a rule within a matter of weeks.¹⁸ The members of the court simply could not keep track of the precedent.¹⁹

15. Regarded initially as a temporary expedient, the court was authorized to exist for only six years. See 1891 Ind. Acts ch. 9, § 26. In 1897, the court's existence was extended for four years. See 1897 Ind. Acts ch. 9, § 3. Finally, in 1901, the General Assembly directed that it be a permanent body. See 1901 Ind. Acts ch. 247, § 19.

16. See Shepard, *supra* note 2, at 682.

17. Shepard, *supra* note 14, at 33.

18. The Indiana Supreme Court's decision in *Phillips v. State*, 492 N.E.2d 10 (Ind. 1986), which held that to establish admissibility of a statement made after an accused has invoked his right to remain silent during custodial interrogation, the state must show that the accused later initiated the dialogue and knowingly waived the previously invoked right to remain silent, was set aside less than six weeks later in *Moore v. State*, 498 N.E.2d 1 (Ind. 1986), which held that a showing that the dialogue was initiated by the accused was not necessary.

19. Compare *Groves v. State*, 456 N.E.2d 720 (Ind. 1983) (reversible error to admitting Regiscope picture without foundation of evidence about the manner in which picture was processed and complete chain of custody), with *Stark v. State*, 489 N.E.2d 43 (Ind. 1986) (proper to admit

B. Say Less

Another approach is to say less, that is to use summary dispositions for those appeals that are present on the merits. Some courts have been known to dispose of cases by order or by simply writing "affirmed."²⁰ A slightly better alternative is the summary opinion. When the Indiana Supreme Court was struggling with volume late in the nineteenth century, some opinions on the merits ran as little as a few sentences.²¹ This is spectacularly unpopular with lawyers and clients. A recent resolution adopted by the American Bar Association affirms this unpopularity: "RESOLVED, That the American Bar Association urges the courts of appeal, federal, state and territorial, to provide in case dispositions (except in those appeals the court determines to be wholly without merit), at a minimum, reasoned explanations for their decisions."²²

C. Say Nothing at All, in Print

Yet another alternative is the unpublished opinion. All of the federal courts of appeal use this device, by which only some of the court's decisions are submitted for inclusion in the Federal Reporter.²³ In the first two decades after the federal courts began the practice, the trend has been to publish fewer opinions.²⁴ Anecdotal information suggests continuing decline.²⁵

Regiscope photograph without evidence of manner of processing or complete chain of custody).

20. For example, the Fifth Circuit has a rule on "Affirmance Without Opinion." U.S. CT. OF APP. 5TH CIR. R. 47.6. In 1985, the Indiana Court of Appeals disposed of 97% of the cases it heard by opinion. See DIVISION OF STATE COURT ADMINISTRATION, 1985 INDIANA JUDICIAL REPORT, *supra* note 1, at 16. The supreme court issued opinions in 99% of the cases it decided on the merits. See *id.* at 2, 10. This figure does not include denials of requests for transfer of cases previously heard by the court of appeals. Some other jurisdictions dispose of less than one fourth of the cases heard by opinion. For example, the New Jersey Supreme Court issued opinions in 18% of the cases it heard, while the Kentucky Supreme Court issued opinions in 23%. See NAT'L CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1985, at 16.

21. See, e.g., *Norris v. State*, 69 Ind. 416 (1879) (46 words) ("This was a prosecution for selling 'one gill of whiskey' without license. The same question is made in this case as that decided in the case of *Arbintrode v. The State*, 67 Ind. 267 (1879). Upon the authority of that case, the judgment in this case must be reversed. Judgment reversed.").

22. American Bar Association, House of Delegates Resolution 8B (Feb. 14, 2000).

23. See Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940, 941-44 (1989).

24. See Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 761 n.14 (1995). Dragich cites several sources suggesting a decline of 40% in the Fifth Circuit's publication rate between 1969 and 1987, for example. See *id.*

25. See Stephen Reihnhardt, *The Supreme Court, the Death Penalty, and the Harris Case*, 102 YALE L.J. 205, 217 (1992) ("When I came on the court [United State Court of Appeals for the

This same practice is followed in a good many state courts, including Indiana.²⁶ As in the federal courts, the use of unpublished decisions in state court appears to be increasing. Professor Keith H. Beyler calculated that the percentage of unpublished opinions in the Indiana Court of Appeals rose from 47.6% in 1981 to 62.8% in 1987.²⁷ In 1999, that court decided seventy-three percent of its cases by unpublished memoranda.²⁸ Indeed, there is a corollary tool available to state high courts: making an intermediate court opinion “disappear” by ordering it depublished. California is famous for this draconian, if convenient practice.²⁹

This too is relatively unpopular.

Commentators have recognized that the very act of putting pen to paper will itself have a sobering effect. However, the absence of the published opinions severely handicaps the timely critical review of judicial action by legal scholars, the press and the bar. It enhances the possibility that victimized users of the judicial process will develop a deep seated distrust of the institution, such that quixotic proposals for restraints of judicial power of the past, will not be derailed by timely judicial accommodation. In short, the lesson we may learn is that justice rendered in silence is not justice.³⁰

Seventh Circuit Chief Judge Richard Posner has said that unpublished opinions

Ninth Circuit] ten years ago, we wrote reasoned opinions in about seventy-five percent of our cases. We now write them in about twenty-five percent. In the large majority of our cases, we write memorandum dispositions which are unpublished. It is no secret that there is not as much time, attention, or care given to the disposition of cases decided in memoranda.”).

26. See IND. APPELLATE RULE 15.
27. See Keith H. Beyler, *Selective Publication Rules: An Empirical Study*, 21 LOY. U. CHI. L.J. 1, 22 (1989).

Unpublished Opinions in the Indiana Court of Appeals

Year	Dist. 1	Dist. 2	Dist. 3	Dist. 4	Ave.
1981	38.3%	63.4%	44.8%	43.9%	47.6%
1982	47.8%	71.4%	55.2%	62.2%	59.2%
1983	52.1%	69.0%	51.7%	64.2%	59.3%
1984	60.0%	66.4%	53.4%	59.8%	59.9%
1985	51.8%	66.4%	45.6%	64.4%	57.1%
1986	53.4%	62.7%	47.5%	58.2%	55.5%
1987	56.1%	70.9%	56.5%	67.5%	62.8%

See id.
28. See, COURT OF APPEALS OF INDIANA 1999 ANNUAL REPORT 4 (1999) (unpublished manuscript on file with the Court of Appeals) (593 published opinions, 2200 total opinions).
29. See Joseph R. Grodin, *The Depublication Practice of the California Supreme Court*, 72 CAL. L. REV. 514 (1984).
30. Lawrence A. Salibra, II, *Increase in Unpublished Opinions Undermines Public Trust in Courts*, 10 LGL. OPINION LETTER 1 (Apr. 28, 2000).

are a "formula for irresponsibility."³¹ Critics especially dislike the limits on subsequent citation that are a feature common to most such rules that limit subsequent citation.³²

D. Add More Judges

Another common tool is simply to increase the number of judges sitting on the state's highest court, on the presumption that more hands will add to the total volume the court is able to turn out. Of course, the increase in the number of justices does not create a similar increase in the number of cases capable of being handled. This is so because it takes longer for a group of seven or nine to come to resolution than it takes a group of five to do so.³³ While there may be other reasons to expand a court, such as making room for justices from different parts of society, increasing the number of bodies lifts total productivity only marginally. The downside of using more judges, of course, is the same peril always posed by great volume—inconsistent outcomes and rules.

While these approaches and others might well be suitable solutions at the margins of our volume problem, none of them alone or collectively would address the Niagara of direct criminal appeals now washing over the Indiana Supreme Court.

CONCLUSION

When the *Indianapolis Star* endorsed amending the Indiana Constitution twelve years ago, it said: "[T]he state's highest court has become less a marketplace of reasoned, scholarly judgment than an assembly line review process. The consequences cannot be good for the law or for the people governed by it."³⁴ Those consequences are with us again. November's constitutional amendment is the best solution.

31. William Glaberson, *Caseload Forcing Two-Level System for U.S. Appeals*, N.Y. TIMES Mar. 14, 1999, at 1 (quoting Circuit Chief Judge Richard Posner).

32. See *In re Amendment of Section (Rule) 809.23(3)*, Stats, 456 N.W.2d 783, 788 (Wis. 1990) (Abrahamson, J., dissenting) ("I have come to believe, as those judges [Holloway, Barrett, and Baldock of the 10th Circuit] do, that any litigant who can point to a prior ruling of the court and can demonstrate that he or she is entitled to prevail under it should be able to do so as a matter of justice and fundamental fairness.").

33. As Judge Posner explains by comparing a group of nine to a group of eleven: The number of links required to connect all the members of a set grows exponentially with the size of the set, in accordance with the formula $n(n-1)/2$. Thus, 36 links are necessary to connect all the members of a set of 9, and 55 for a set of 11—half again as many. But the reduction in the number of opinion assignments per capita would be less than one-fifth (it would be 2/11).

RICHARD POSNER, THE FEDERAL COURTS 14 (1985).

34. *Proposition 2*, INDIANAPOLIS STAR, Oct. 2, 1988, at F-2.

AN EXAMINATION OF THE INDIANA SUPREME COURT DOCKET, DISPOSITIONS, AND VOTING IN 1999*

KEVIN W. BETZ**
MARK A. LINDSEY***

In 1999, the Indiana Supreme Court continued to battle with a hefty docket of mandatory criminal appeals.¹ Although the court increased its number of discretionary cases over last year's number, it still finds itself bogged down in mandatory criminal appeals.² The court issued 170 written opinions, 101

* The Tables presented in this Article are patterned after the annual statistics of the U.S. Supreme Court published in the *Harvard Law Review*. An explanation of the origin of these Tables can be found in *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 93, 301-02 (1968). The *Harvard Law Review* granted permission for the use of these Tables by the *Indiana Law Review* this year; however, permission for any further reproduction of these Tables must be obtained from the *Harvard Law Review*.

We thank Barnes & Thornburg for its gracious willingness to devote the time, energy, and resources of its law firm to allow a project such as this to be accomplished. As is appropriate, credit for the idea for this project goes to Chief Justice Shepard; but, of course, any errors or omissions belong to his former law clerk. We also thank WESTLAW® for its kind willingness to allow us free access to its computer resources and assistance in preparing these Tables.

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1.

	MANDATORY	DISCRETIONARY	TOTAL
1991	109 (53%)	98 (47%)	207
1992	64 (41%)	93 (59%)	157
1993	60 (44%)	77 (56%)	137
1994	60 (45%)	73 (55%)	133
1995	46 (38%)	76 (62%)	122
1996	68 (59%)	48 (41%)	116
1997	100 (58%)	71 (42%)	171
1998	84 (63%)	50 (37%)	134
1999	101 (59%)	69 (41%)	170

2. The court fought this battle against an overwhelming number of mandatory criminal cases in 1998. The court is fighting the battle again. See Kevin W. Betz & Andrew T. Deibert, *An Examination of the Indiana Supreme Court Docket, Dispositions, and Voting in 1996*, 30 IND. L. REV. 933 (1997); see also Randall T. Shepard, *Changing the Constitutional Jurisdiction of the Indiana Supreme Court: Letting a Court of Last Resort Act Like One*, 63 IND. L.J. 669 (1988); Randall T. Shepard, *Foreword: Indiana Law, the Supreme Court, and a New Decade*, 24 IND. L. REV. 499 (1991).

mandatory and 69 discretionary. The amendment to the Indiana Constitution to decrease this overload of mandatory criminal appeals will be put to voters in the coming state-wide election in November 2000. Another point of interest was Justice Selby's resignation from the court in 1999. Justice Selby was replaced by Justice Rucker.³

The following is a description of the highlights from each table.

Table A. Justice Boehm proved himself to be by far the most productive member of the court in terms of the number of opinions written. He produced 64 written opinions—the most overall, the most criminal, and the most civil. He authored 23 more opinions than Justice Sullivan, who was the second-most productive with 41 opinions. The court as a whole issued 132 criminal opinions and 48 civil opinions. Each of the Justices either continued at his or her same level of production or increased dramatically. For example, Justice Boehm went from 43 opinions in 1998 to 64 opinions in 1999. Justice Sullivan went from 29 opinions in 1998 to 41 opinions in 1999.

The court also increased its number of dissents from an 8-year low of 23 in 1998 to 38 in 1999. The largest number of dissenting opinions were written by two justices—Justice Dickson with 16 and Justice Sullivan with 11.

Table B-1. For civil cases, Justice Boehm and Justice Selby were the two justices most in agreement at 87%. Justice Boehm and Chief Justice Shepard were next at 84.8%. Overall, Justices Boehm and Shepard individually were the most aligned with their colleagues and Justice Sullivan was the least aligned.

Table B-2. For criminal cases, Justices Boehm and Selby were again the two justices most aligned at 96.8%. The two justices least aligned were Selby and Sullivan. Overall, Justice Boehm was most aligned with his colleagues, and Justice Sullivan was the least aligned.

Table B-3. For all cases, Justices Boehm and Selby were obviously the two most aligned justices at 93.6%. The two least aligned were Justices Sullivan and Selby at 78.4%, and Justices Dickson and Sullivan were close behind at 79.4%. Overall, Justices Boehm and Shepard were individually the most aligned with their colleagues while Justice Sullivan was the individual justice least aligned with all of his colleagues.

Table C. The court's level of unanimity remained high, at 87%, just below the

3. The voting alignment among justices reflected in Tables B-1, B-2, and B-3 does not include statistics on the alignment of the court's newest member, Justice Rucker, with his peers. Statistics on Justice Rucker were omitted due to the limited number of opinions in which he participated, in this, his first year on the court. Justice Rucker participated in at least 15 opinions during 1999.

court's 1998 level of unanimity of 88%. Once again this high level of unanimity was primarily attributable to the less-divisive mandatory docket of criminal cases.

Table D. The number of 3-2 opinions tripled to nine in 1999 from a low of only three in 1998. The now retired Justice Selby was in the majority the most often, having been in the majority in eight of the nine opinions.

Table E-1. The court affirmed almost 80% of the mandatory criminal appeals, and it affirmed only 18% of the discretionary civil appeals.

Table E-2. The court increased the number of civil petitions it transferred from 32 in 1998 to 35 in 1999. The number of criminal petitions it transferred decreased slightly from 23 in 1998 to 22 in 1999. The greatest percentage change in petitions denied was in the area of juvenile cases. The court did not grant any petitions to transfer in juvenile cases, denying all 38 petitions it considered in 1999.

A civil petition to transfer stood about a 10% chance of being granted, and a criminal petition to transfer stood about a 5% chance of being granted. Both of these rates are consistent with those in 1998.

Table F. The area that drew the sharpest increased attention from the court was medical malpractice. The court disposed of 12 medical malpractice cases in 1999 after handing down zero such cases in 1998. The court also issued 11 negligence or personal injury cases following the issuance of only 4 last year. Once again, the court discussed Indiana Constitutional issues in 21 cases in 1999.

TABLE A
OPINIONS^a

	OPINIONS OF COURT ^b			CONCURRENCES ^c			DISSENTS ^d		
	Criminal	Civil	Total	Criminal	Civil	Total	Criminal	Civil	Total
Shepard, C.J.	23	8	31	3	3	6	2	4	6
Dickson, J.	19	0	19	1	1	2	5	11	16
Sullivan, J. ^e	30	11	41	8	8	16	7	4	11
Selby, J.	11	13	24	7	1	8	0	1	1
Boehm, J. ^e	48	16	64	8	4	12	3	1	4
Per Curiam	1	39	40						
Total	132	87	219	27	17	44	17	21	38

^a These are opinions and votes on opinions by each justice and those that were in per curiam in the 1999 term. The Indiana Supreme Court is unique because it is the only supreme court to assign each case to a justice by a consensus method. Cases are distributed by a consensus of the justices in the majority on each case either by volunteering or nominating writers. The chief justice does not have any power to control the assignments other than as a member of the majority. See Melinda Gann Hall, *Opinion Assignment Procedures and Conference Practices in State Supreme Courts*, 73 JUDICATURE 209, 209 (1990). The order of discussion and voting is started by the most junior member of the court and continues according to reverse seniority. See *id.*

^b This is only a counting of full opinions written by each justice. Plurality opinions that announce the judgment of the court are counted as opinions of the court. It includes opinions on civil, criminal, and original actions. Also, the following four miscellaneous cases are not included in the table: *Walker v. Campbell*, 719 N.E.2d 1248 (Ind. 1999) (order granting transfer and dismissing appeal); *State v. Klein*, 719 N.E.2d 386 (Ind. 1999) (dissent from denial of petition to transfer); *State v. Linck*, 716 N.E.2d 892 (Ind. 1999) (vacating order granting petition to transfer); *Michigan Mutual Insurance Co. v. Sports, Inc.*, 706 N.E.2d 555 (Ind. 1999) (denying petition to transfer and striking appellant's brief in support of petition to transfer for its "scurrilous and intemperate attack on the integrity of the Court of Appeals").

^c This category includes both written concurrences and votes to concur in result only.

^d This category includes both written dissents and votes to dissent without opinion. Opinions concurring in part and dissenting in part or opinions concurring in part only and differing on another issue are counted as dissents.

^e Justices declined to participate in the following four non-disciplinary cases; Chief Justice Shepard declined to participate in *Doe v. Shults-Lewis Child & Family Services, Inc.*, 718 N.E.2d 728 (Ind. 1999), *Weinberg v. Bess*, 717 N.E.2d 584 (Ind. 1999), and *Halbe v. Weinberg*, 717 N.E.2d 876 (Ind. 1999); Justice Sullivan declined to participate in *Indiana Bell Telephone Co. v. Indiana Utility Regulatory Commission*, 715 N.E.2d 351 (Ind. 1999)).

TABLE B-1
VOTING ALIGNMENTS FOR CIVIL CASES,
NOT INCLUDING JUDICIAL OR ATTORNEY DISCIPLINE CASES^f

		Shepard, C.J.	Dickson, J.	Sullivan, J.	Selby, J.	Boehm, J.
Shepard, C.J.	O		35	35	36	39
	S		2	1	0	0
	D	---	37	36	36	39
	N		46	45	43	46
	P		80.4%	80.0%	83.7%	84.8%
Dickson, J.	O	35		32	38	40
	S	2		1	0	0
	D	37	---	33	38	40
	N	46		48	46	49
	P	80.4%		68.8%	82.6%	81.6%
Sullivan, J.	O	35	32		33	35
	S	1	1		0	3
	D	36	33	---	33	38
	N	45	48		45	48
	P	80.0%	68.8%		73.3%	79.2%
Selby, J.	O	36	38	33		40
	S	0	0	0		0
	D	36	38	33	---	40
	N	43	46	45		46
	P	83.7%	82.6%	73.3%		87.0%
Boehm, J.	O	39	40	35	40	
	S	0	0	3	0	
	D	39	40	38	40	---
	N	46	49	48	46	
	P	84.8%	81.6%	79.2%	87.0%	

^f This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for only civil cases. For example, in the top set of numbers for Chief Justice Shepard, 35 is the number of times Chief Justice Shepard and Justice Dickson agreed in a full majority opinion in a civil case. Two justices are considered to be in agreement whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. In the Table, two justices are not treated as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

- “O” represents the number of decisions in which the two justices agreed in opinions of the court or opinions announcing the judgment of the court.
- “S” represents the number of decisions in which the two justices agreed in separate opinions, including agreements in both concurrences and dissents.
- “D” represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.
- “N” represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.
- “P” represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing “D” by “N.”

TABLE B-2
VOTING ALIGNMENTS FOR CRIMINAL CASES,
NOT INCLUDING JUDICIAL OR ATTORNEY DISCIPLINE CASES*

		Shepard, C.J.	Dickson, J.	Sullivan, J.	Selby, J.	Boehm, J.
Shepard, C.J.	O		120	114	84	116
	S		0	2	0	0
	D	---	120	116	84	116
	N		132	132	94	132
	P		90.9%	87.9%	89.4%	87.9%
Dickson, J.	O	120		110	84	117
	S	0		0	0	3
	D	120	---	110	84	120
	N	132		132	94	132
	P	90.9%		83.3%	89.4%	90.9%
Sullivan, J.	O	114	110		76	109
	S	2	0		0	0
	D	116	110	---	76	109
	N	132	132		94	132
	P	87.9%	83.3%		80.9%	82.6%
Selby, J.	O	84	84	76		85
	S	0	0	0		6
	D	84	84	76	---	91
	N	94	94	94		94
	P	89.4%	89.4%	80.9%		96.8%
Boehm, J.	O	116	117	109	85	
	S	0	3	0	6	
	D	116	120	109	91	---
	N	132	132	132	94	
	P	87.9%	90.9%	82.6%	96.8%	

* This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for criminal cases. For example, in the top set of numbers for Chief Justice Shepard, 120 is the number of times Chief Justice Shepard and Justice Dickson agreed in a full majority opinion in a criminal case. Two justices are considered to be in agreement whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. In the Table, two justices are not treated as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

- "O" represents the number of decisions in which the two justices agreed in opinions of the court or opinions announcing the judgment of the court.
- "S" represents the number of decisions in which the two justices agreed in separate opinions, including agreements in both concurrences and dissents.
- "D" represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.
- "N" represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.
- "P" represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing "D" by "N."

TABLE B-3
VOTING ALIGNMENTS FOR ALL CASES,
NOT INCLUDING JUDICIAL OR ATTORNEY DISCIPLINE CASES^b

		Shepard, C.J.	Dickson, J.	Sullivan, J.	Selby, J.	Boehm, J.
Shepard, C.J.	O		155	149	120	155
	S		2	3	0	0
	D	---	157	152	120	155
	N		178	177	137	178
	P		88.2%	85.9%	87.6%	87.1%
Dickson, J.	O	155		142	122	157
	S	2		1	0	3
	D	157	---	143	122	160
	N	178		180	140	181
	P	88.2%		79.4%	87.1%	88.4%
Sullivan, J.	O	149	142		109	144
	S	3	1		0	3
	D	152	143	---	109	147
	N	177	180		139	180
	P	85.9%	79.4%		78.4%	81.7%
Selby, J.	O	120	122	109		125
	S	0	0	0		6
	D	120	122	109	---	131
	N	137	140	139		140
	P	87.6%	87.1%	78.4%		93.6%
Boehm, J.	O	155	157	144	125	
	S	0	3	3	6	
	D	155	160	147	131	---
	N	178	181	180	140	
	P	87.1%	88.4%	81.7%	93.6%	

^b This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for all cases. For example, in the top set of numbers for Chief Justice Shepard, 155 is the total number of times Chief Justice Shepard and Justice Dickson agreed in all full majority opinions written by the court in 1999. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. In the Table, two justices are not treated as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

- “O” represents the number of decisions in which the two justices agreed in opinions of the court or opinions announcing the judgment of the court.
- “S” represents the number of decisions in which the two justices agreed in separate opinions, including agreements in both concurrences and dissents.
- “D” represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.
- “N” represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.
- “P” represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing “D” by “N.”

TABLE C

UNANIMITY,
NOT INCLUDING JUDICIAL OR ATTORNEY DISCIPLINE CASESⁱ

Unanimous ^j			Unanimous With Concurrence ^k			Opinions With Dissent			Total
Criminal	Civil	Total	Criminal	Civil	Total	Criminal	Civil	Total	
101	30	131(72.8%)	17	9	26(14.4%)	13	10	23(12.8%)	180

ⁱ This Table tracks the number and percent of unanimous opinions among all opinions written. If, for example, only four justices participate and all concur, it is still considered unanimous. It also tracks the percent of overall opinions with concurrence and overall opinions with dissent.

^j A decision is considered unanimous only when all justices participating in the case voted to concur in the court's opinion as well as its judgment. When one or more justice concurred in the result but not in the opinion, the case is not considered unanimous.

^k A decision is listed in this column if one or more justice concurred in the result but not in the opinion of the court. A decision is also listed in this column if one or more justice wrote a concurrence, and there were no dissents.

TABLE D

3-2 DECISIONS¹

Justices Constituting the Majority	Number of Opinions ^m
1. Shepard, C.J., Selby, J., Boehm, J.	1
2. Shepard, C.J., Sullivan, J., Selby, J.	1
3. Shepard, C.J., Dickson, J., Selby, J.	2
4. Shepard, C.J., Sullivan, J., Rucker, J.	1
5. Dickson, J., Selby, J., Boehm, J.	2
6. Sullivan, J., Selby, J., Boehm, J.	2
Total ⁿ	9

¹ This Table concerns only decisions rendered by full opinion. It does not include the case of *In re Lahey*, 716 N.E.2d 362 (Ind. 1999) (per curiam), which although a 3-2 decision, is not a full opinion and is instead an order granting petition for reinstatement in an attorney discipline proceeding. An opinion is counted as a 3-2 decision if two justices voted to decide the case in a manner different from that of the majority of the court.

^m This column lists the number of times each three-justice group constituted the majority in a 3-2 decision.

ⁿ The 1999 term's 3-2 decisions were:

1. Shepard, C. J., Selby, J., Boehm, J.: *Yoon v. Yoon*, 711 N.E.2d 1265 (Ind. 1999) (Boehm, J.).
2. Shepard, C.J., Sullivan, J., Selby, J.: *Hernandez v. State*, 716 N.E.2d 948 (Ind. 1999) (Sullivan, J.).
3. Shepard, C.J., Dickson, J., Selby, J.: *Shane v. State*, 716 N.E.2d 391 (Ind. 1999) (Selby, J.); *Ellis v. Luxbury Hotels, Inc.*, 716 N.E.2d 359 (Ind. 1999) (Selby, J.).
4. Shepard, C.J., Sullivan, J., Rucker, J.: *Allen v. State*, 720 N.E.2d 707 (Ind. 1999) (Shepard, C.J.).
5. Dickson, J., Selby, J., Boehm, J.: *Riley v. State*, 711 N.E.2d 489 (Ind. 1999) (Dickson, J.); *Palmer v. State*, 704 N.E.2d 124 (Ind. 1999) (Dickson, J.).
6. Sullivan, J., Selby, J., Boehm, J.: *In re Reed*, 716 N.E.2d 426 (Ind. 1999) (per curiam); *Journal-Gazette Co. v. Bandido's, Inc.*, 712 N.E.2d 446 (Ind. 1999) (Sullivan, J.).

TABLE E-1

DISPOSITION OF CASES REVIEWED BY TRANSFER
AND DIRECT APPEALS^o

	Reversed or Vacated ^p	Affirmed	Total
Civil Appeals Accepted for Transfer	37 (82%)	8 (18%)	45
Direct Civil Appeals	0	2 (100%)	2
Criminal Appeals Accepted for Transfer	18 (75%)	6 (25%)	24
Direct Criminal Appeals	21 (21%)	78 (79%)	99
Total	76 (44.7%)	94(55.3%)	170 ^q

^o Direct criminal appeals are cases in which the trial court imposed a sentence of greater than 50 years. *See* IND. CONST. art. VII, § 4. Thus, direct criminal appeals are those that come directly from the trial court. A civil appeal may also be direct from the trial court. *See* IND. R. APP. P. 4(A). *See generally* IND. ORIGINAL ACTION RULES. All other Indiana Supreme Court opinions are accepted for transfer from the Indiana Court of Appeals. *See* IND. APP. R. 11(B). The court's transfer docket, especially civil cases, has substantially increased in the past five years, but declined significantly last year. *See* Randall T. Shepard, *Indiana Law, the Supreme Court, and a New Decade*, 24 IND. L. REV. 499 (1991).

^p Generally, the term "vacate" is used by the Indiana Supreme Court when it is reviewing a court of appeals opinion, and the term "reverse" is used when the court overrules a trial court decision. A point to consider in reviewing this Table is that the court technically "vacates" every court of appeals opinion that is accepted for transfer, but may only disagree with a small portion of the reasoning and still agree with the result. *See* IND. APP. R. 11(B)(3). As a practical matter, "reverse" or "vacate" simply represents any action by the court that does not affirm the trial court or court of appeals opinion.

^q This does not include 37 attorney and judicial discipline opinions and two opinions related to certified questions. These opinions did not reverse, vacate, or affirm any other court's decision. This also does not include seven opinions which considered petitions for post-conviction relief, five opinions which considered petitions for rehearing, one order setting the date for execution of a death sentence, or one opinion which considered an interlocutory appeal in a capital punishment case.

TABLE E-2

DISPOSITION OF PETITIONS TO TRANSFER
TO SUPREME COURT IN 1999^r

	Denied or Dismissed	Granted	Total
Petitions to Transfer			
Civil ^s	300 (89.6%)	35 (10.4%)	335
Criminal ^t	396 (94.7%)	22 (5.3%)	418
Juvenile	38 (100%)	0	38
Total	734 (92.8%)	57 (7.2%)	791

^r This Table analyzes the disposition of petitions to transfer by the court. See IND. R. APP. P. 11(B). This Table is compiled from information provided by the Indiana Supreme Court in a report entitled, "Grant and Denial of Cases in Which Transfer to the Indiana Supreme Court Has Been Sought."

^s This category also includes petitions to transfer in tax cases and worker's compensation cases.

^t This category also includes petitions to transfer in post-conviction relief cases.

TABLE F
SUBJECT AREAS OF SELECTED DISPOSITIONS
WITH FULL OPINIONS^u

Original Actions	Number
• Certified Questions	2 ^v
• Writs of Mandamus or Prohibition	0
• Attorney and Judicial Discipline	33 ^w
• Judicial Discipline	4 ^x
Criminal	
• Death Penalty	9 ^y
• Fourth Amendment or Search and Seizure	4 ^z
• Writ of Habeas Corpus	0
Emergency Appeals to the Supreme Court	3 ^{aa}
Trusts, Estates, or Probate	0
Real Estate or Real Property	2 ^{bb}
Personal Property	0
Landlord-Tenant	3 ^{cc}
Divorce or Child Support	3 ^{dd}
Children in Need of Services (CHINS)	0
Paternity	0
Product Liability or Strict Liability	1 ^{ee}
Negligence or Personal Injury	11 ^{ff}
Invasion of Privacy	0
Medical Malpractice	12 ^{gg}
Indiana Tort Claims Act	1 ^{hh}
Statute of Limitations or Statute of Repose	1 ⁱⁱ
Tax, Department of State Revenue, or State Board of Tax Commissioners	1 ^{jj}
Contracts	0
Corporate Law or the Indiana Business Corporation Law	0
Uniform Commercial Code	1 ^{kk}
Banking Law	0
Employment Law	0
Insurance Law	1 ^{ll}
Environmental Law	0
Consumer Law	0
Workers Compensation	2 ^{mm}
Arbitration	0
Administrative Law	0
First Amendment, Open Door Law, or Public Records Law	1 ⁿⁿ
Full Faith and Credit	0
Eleventh Amendment	0
Civil Rights	2 ^{oo}
Indiana Constitution	21 ^{pp}

^u This Table is designed to provide a general idea of the specific subject areas which the court discussed or ruled on and how many times it did so in 1999. It is also a quick-reference guide to court rulings

for practitioners in specific areas of the law. The numbers corresponding to the areas of law reflect the number of cases in which the court substantively discussed legal issues about these subject areas.

^v *Brownsburg Area Patrons Affecting Change v. Baldwin*, 714 N.E.2d 135 (Ind. 1999); *United Nat'l Ins. Co. v. DePrizio*, 705 N.E.2d 455 (Ind. 1999).

^w *In re Litz*, 721 N.E.2d 258 (Ind. 1999); *In re Razo*, 720 N.E.2d 719 (Ind. 1999); *In re Graddick*, 719 N.E.2d 1245 (Ind. 1999); *In re Bell*, 718 N.E.2d 1115 (Ind. 1999); *In re Benjamin*, 718 N.E.2d 1111 (Ind. 1999); *In re Puterbaugh*, 716 N.E.2d 1287 (Ind. 1999); *In re Corbin*, 716 N.E.2d 429 (Ind. 1999); *In re Reed*, 716 N.E.2d 426 (Ind. 1999); *In re Deets*, 716 N.E.2d 366 (Ind. 1999); *In re Wilson*, 715 N.E.2d 838 (Ind. 1999); *In re Van Rider*, 715 N.E.2d 402 (Ind. 1999); *In re Gole*, 715 N.E.2d 399 (Ind. 1999); *In re Cable*, 715 N.E.2d 396 (Ind. 1999); *In re Davis*, 715 N.E.2d 386 (Ind. 1999); *In re Cherry*, 715 N.E.2d 382 (Ind. 1999); *In re Conn*, 715 N.E.2d 379 (Ind. 1999); *In re Welling*, 715 N.E.2d 377 (Ind. 1999); *In re Caldwell*, 715 N.E.2d 362 (Ind. 1999); *In re Kummerer*, 714 N.E.2d 653 (Ind. 1999); *In re Brown*, 714 N.E.2d 630 (Ind. 1999); *State ex rel. Indiana State Bar Ass'n v. State Bd. of Tax Commr's*, 714 N.E.2d 128 (Ind. 1999); *In re Halcarz*, 712 N.E.2d 964 (Ind. 1999); *In re Contempt of Houston*, 711 N.E.2d 33 (Ind. 1999); *In re Schneider*, 710 N.E.2d 178 (Ind. 1999); *In re Warren*, 708 N.E.2d 873 (Ind. 1999); *In re Siegel*, 708 N.E.2d 869 (Ind. 1999); *In re Norman*, 708 N.E.2d 867 (Ind. 1999); *In re Contempt of Crenshaw*, 708 N.E.2d 859 (Ind. 1999); *In re Eager*, 708 N.E.2d 584 (Ind. 1999); *In re Snyder*, 706 N.E.2d 1080 (Ind. 1999); *In re Samai*, 706 N.E.2d 146 (Ind. 1999); *In re Heppenheimer*, 705 N.E.2d 996 (Ind. 1999); *In re Fleener*, 705 N.E.2d 994 (Ind. 1999).

^x *In re Bybee*, 716 N.E.2d 957 (Ind. 1999); *In re Jacobi*, 715 N.E.2d 873 (Ind. 1999); *In re Johnson*, 715 N.E.2d 370 (Ind. 1999); *In re Public Law 16-1995*, 714 N.E.2d 126 (Ind. 1999).

^y *Dye v. State*, 717 N.E.2d 5 (Ind. 1999); *Benefiel v. State*, 716 N.E.2d 906 (Ind. 1999); *Trueblood v. State*, 715 N.E.2d 1242 (Ind. 1999); *State v. Price*, 715 N.E.2d 331 (Ind. 1999); *Rondon v. State*, 711 N.E.2d 506 (Ind. 1999); *Conner v. State*, 711 N.E.2d 1238 (Ind. 1999); *Harrison v. State*, 707 N.E.2d 767 (Ind. 1999); *Williams v. State*, 706 N.E.2d 149 (Ind. 1999); *Rouster v. State*, 705 N.E.2d 999 (Ind. 1999).

^z *Wise v. State*, 719 N.E.2d 1192 (Ind. 1999); *Vehorn v. State*, 717 N.E.2d 869 (Ind. 1999); *Baldwin v. Reagan*, 715 N.E.2d 332 (Ind. 1999); *Middleton v. State*, 714 N.E.2d 1099 (Ind. 1999).

^{aa} *Cincinnati Ins. Co. v. Wills*, 717 N.E.2d 151 (Ind. 1999); *GTE Corp. v. Indiana Util. Regulatory Comm'n*, 715 N.E.2d 360 (Ind. 1999); *Indiana Bell Tel. Co. v. Indiana Util. Regulatory Comm'n*, 715 N.E.2d 351 (Ind. 1999).

^{bb} *Carnahan v. Moria Property Owners Ass'n, Inc.*, 716 N.E.2d 437 (Ind. 1999); *Dibble v. City of Lafayette*, 713 N.E.2d 269 (Ind. 1999).

^{cc} *Johnson v. Scandia Assocs.*, 717 N.E.2d 24 (Ind. 1999); *Schuman v. Kobets*, 716 N.E.2d 355 (Ind. 1999); *Vernon v. Kroger Co.*, 712 N.E.2d 976 (Ind. 1999).

^{dd} *Glass v. Oeder*, 716 N.E.2d 413 (Ind. 1999); *Cowart v. White*, 711 N.E.2d 523 (Ind. 1999); *Yoon v. Yoon*, 711 N.E.2d 1265 (Ind. 1999).

^{ee} *Estate of Shebel v. Yaskawa Elec. Am., Inc.*, 713 N.E.2d 275 (Ind. 1999).

^{ff} *Serviss v. State Dep't of Natural Resources*, 721 N.E.2d 234 (Ind. 1999); *Benton v. City of Oakland City*, 721 N.E.2d 224 (Ind. 1999); *Conder v. Wood*, 716 N.E.2d 432 (Ind. 1999); *Ross v. Cheema*, 716 N.E.2d 435 (Ind. 1999); *Ellis v. Luxbury Hotels, Inc.*, 716 N.E.2d 359 (Ind. 1999); *Tipmont Rural Elec. Membership Corp. v. Fischer*, 716 N.E.2d 357 (Ind. 1999); *Carrie v. PSI Energy, Inc.*, 715 N.E.2d 853 (Ind. 1999); *Pelo v. Franklin College*, 715 N.E.2d 365 (Ind. 1999); *L.W. v. Western Golf Ass'n*, 712 N.E.2d 983 (Ind. 1999); *Vernon v. Kroger Co.*, 712 N.E.2d 976 (Ind. 1999); *Delta Tau Delta, Beta Alpha Chapter v. Johnson*, 712 N.E.2d 968 (Ind. 1999).

^{gg} *Emergency Physicians v. Pettit*, 718 N.E.2d 753 (Ind. 1999); *Halbe v. Weinberg*, 717 N.E.2d 876 (Ind. 1999); *Weinberg v. Bess*, 717 N.E.2d 584 (Ind. 1999); *Poehlman v. Feferman*, 717 N.E.2d 578 (Ind. 1999).

1999); *Wells v. Metrohealth*, 716 N.E.2d 933 (Ind. 1999); *Wisniewski v. Bennett*, 716 N.E.2d 892 (Ind. 1999); *Harris v. Raymond*, 715 N.E.2d 388 (Ind. 1999); *Sword v. NKC Hosps., Inc.*, 714 N.E.2d 142 (Ind. 1999); *Van Dusen v. Stotts*, 712 N.E.2d 491 (Ind. 1999); *Johnson v. Gupta*, 711 N.E.2d 1286 (Ind. 1999); *Martin v. Richey*, 711 N.E.2d 1273 (Ind. 1999); *Smith v. Johnston*, 711 N.E.2d 1259 (Ind. 1999).

^{hh} *Indiana Farmers Mut. Ins. Co. v. Richie*, 707 N.E.2d 992 (Ind. 1999).

ⁱⁱ *Doe v. Shults-Lewis Child & Family Servs., Inc.*, 718 N.E.2d 738 (Ind. 1999).

^{jj} *Tax Certificate Invs., Inc. v. Smethers*, 714 N.E.2d 131 (Ind. 1999).

^{kk} *HCC Credit Corp. v. Springs Valley Bank & Trust*, 712 N.E.2d 952 (Ind. 1999).

^{ll} *Cincinnati Ins. Co. v. Wills*, 717 N.E.2d 151 (Ind. 1999).

^{mm} *Wine-Settergren v. Lamey*, 716 N.E.2d 381 (Ind. 1999); *Tippmann v. Hensler*, 716 N.E.2d 372 (Ind. 1999).

ⁿⁿ *Journal-Gazette Co. v. Bandido's, Inc.*, 712 N.E.2d 446 (Ind. 1999).

^{oo} *Indiana Civil Rights Comm'n v. Indianapolis Newspapers, Inc.*, 716 N.E.2d 943 (Ind. 1999); *Indiana Civil Rights Comm'n v. Alder*, 714 N.E.2d 632 (Ind. 1999).

^{pp} *Hampton v. State*, 719 N.E.2d 803 (Ind. 1999); *Trowbridge v. State*, 717 N.E.2d 138 (Ind. 1999); *Collins v. State*, 717 N.E.2d 108 (Ind. 1999); *Guffey v. State*, 717 N.E.2d 103 (Ind. 1999); *McIntire v. State*, 717 N.E.2d 96 (Ind. 1999); *Taylor v. State*, 717 N.E.2d 90 (Ind. 1999); *Griffin v. State*, 717 N.E.2d 73 (Ind. 1999); *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999); *Merrill v. State*, 716 N.E.2d 902 (Ind. 1999); *May v. State*, 716 N.E.2d 419 (Ind. 1999); *Wilder v. State*, 716 N.E.2d 403 (Ind. 1999); *Franklin v. State*, 715 N.E.2d 1237 (Ind. 1999); *Wurster v. State*, 715 N.E.2d 341 (Ind. 1999); *Baldwin v. Reagan*, 715 N.E.2d 332 (Ind. 1999); *Goodner v. State*, 714 N.E.2d 638 (Ind. 1999); *Angleton v. State*, 714 N.E.2d 156 (Ind. 1999); *Simmons v. State*, 714 N.E.2d 153 (Ind. 1999); *Van Dusen v. Stotts*, 712 N.E.2d 491 (Ind. 1999); *Martin v. Richey*, 711 N.E.2d 1273 (Ind. 1999); *McQueen v. State*, 711 N.E.2d 503 (Ind. 1999); *Henson v. State*, 707 N.E.2d 792 (Ind. 1999).

1999 DEVELOPMENTS IN FEDERAL CIVIL PRACTICE FOR SEVENTH-CIRCUIT PRACTITIONERS

JOHN R. MALEY*

INTRODUCTION

Local federal practitioners encountered significant changes in federal civil practice during the survey period. New opinions from the Seventh Circuit and the local district courts refined procedural precedent and local rule changes in the Southern District of Indiana effective January 1, 2000, significantly impact local summary judgment practice. This Article outlines these important developments.

I. JURISDICTION

A. Removal

Under 28 U.S.C. § 1446(b), a removal notice of a state court action must be filed in federal court "within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the [complaint]."¹ Historically, most federal courts have held that the removal clock began to run—as suggested by the "or otherwise" language of § 1446(b)—upon receipt of the complaint from any source, even if not formally served in compliance with Rule 4. The Seventh Circuit, for instance, has sided with other circuits adopting this interpretation.²

The Supreme Court stepped into the fray recently and adopted a removal-friendly interpretation of § 1446(b). Specifically, in *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*,³ the Court held that the removal clock does not commence until formal service (or waiver of service). In a six to three opinion authored by Justice Ginsburg, the Court relied on legislative history to conclude that § 1446(b) was not intended to trigger the removal clock prior to formal service.⁴ In dissent, Chief Justice Rehnquist and Justices Scalia and Thomas criticized the majority for not following the plain language of the statute.⁵

Nonetheless, after *Murphy Bros.*, the removal clock starts upon formal service of the complaint. The result was positive in that it lends more predictability and certainty to this aspect of federal practice.

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1. 28 U.S.C. § 1446(b) (1994).

2. See, e.g., *Roe v. O'Donohue*, 38 F.3d 298, 303 (7th Cir. 1994) ("Once the defendant possesses a copy of the complaint, it must decide promptly in which court it wants to proceed.").

3. 526 U.S. 344 (1999).

4. See *id.* at 352.

5. See *id.* at 357 (Rehnquist, C.J., dissenting).

B. Diversity of Citizenship

In *Mader v. Motorola, Inc.*,⁶ the plaintiff sued in state court alleging state-law claims, and the defendants removed the action to federal court asserting diversity of jurisdiction. The plaintiff moved to remand, asserting that he was an Illinois resident (which would have defeated diversity).⁷ The district court denied the motion without deciding the plaintiff's citizenship, but allowed leave to renew the motion after discovery regarding the plaintiff's citizenship.⁸ Four years later, and without the diversity issue arising in the meantime, the district court reached the merits of the case by granting defendants' motion for summary judgment.⁹ In the plaintiff's appeal of the summary judgment ruling, the plaintiff raised the diversity issue again in his docketing statement.

Without reaching the merits of the summary judgment ruling, the Seventh Circuit remanded the matter to the district court to resolve the diversity issue.¹⁰ Because the district court had not in the first instance entered a finding on the plaintiff's citizenship, the Seventh Circuit found itself "unable to ascertain whether subject-matter jurisdiction is proper."¹¹ In remanding the action, the Seventh Circuit provided guidance on the issue, outlining the following principles for determining diversity of citizenship:

- for diversity purposes, an individual is a citizen of her domicile;
- in general, one's domicile is one's permanent home, or the place to which one intends to return;
- domicile must be determined from the totality of the circumstances, with courts focusing on factors such as residence, voting practices, location of real and personal property, bank and brokerage accounts, memberships, employment, driver's license and car registration, and payment of state taxes;
- no single factor is determinative;
- nor can a party's claim of domicile resolve the matter, for self-serving statements are subject to skepticism when in conflict with the facts; and
- the decision on citizenship is a jurisdictional fact that is reviewed for

6. No. 98-3040, 1999 WL 220108 (7th Cir. Apr. 9, 1999).

7. *See id.* at *1.

8. *See id.*

9. *See id.*

10. *See id.* at *2.

11. *Id.*

clear error.¹²

II. DISCOVERY

A. Third-Party Discovery

Defendants often seek expansive third-party discovery of the plaintiffs, including prior employment records, medical records, and educational records. In *Perry v. Best Lock Corp.*,¹³ defendant served nineteen non-party subpoenas upon past, present, and prospective employers of the plaintiff in an employment discrimination action. The plaintiff moved to quash the subpoenas. Judge Hamilton granted the motion, reasoning that under Fed. R. Civ. P. 26(b)(2) the defendant had not identified any specific concerns or targets for its "sweeping and intrusive discovery requests."¹⁴

In an unrelated case, Judge McKinney denied a plaintiff's motion to quash a defendant's subpoenas seeking certain records from third parties in an action under the Americans With Disabilities Act. Specifically, in *Burkhart v. Heritage Products*,¹⁵ the court denied the plaintiff's motion to quash and ordered the plaintiff's prior employers to produce the following information: (a) any personnel files maintained on the plaintiff; (b) any documents relating to any complaint or charge made by the plaintiff with any local, state, or federal governmental agency; (c) the plaintiff's medical records; and (d) job descriptions for positions held by the plaintiff.¹⁶

In a similar situation, Magistrate Judge Hussman denied a plaintiff's motion to quash third-party subpoenas served upon prior employers in a discrimination case. Judge Hussman also denied a motion to quash a subpoena served on the Indiana Department of Employment and Training Services related to unemployment records.¹⁷

Similarly, in *Brady v. CIRBC*,¹⁸ the plaintiff sued for sexual harassment, sex discrimination, and retaliation resulting in termination. Defendant served a third-party document request and subpoena upon the plaintiff's new employer and to the employer she worked for immediately prior to defendant, seeking the plaintiff's personnel and medical files from each. The plaintiff moved to quash, arguing that the subpoenas were part of a harassing "fishing expedition."

Judge Cosbey denied the motion to quash in a four-page opinion, reasoning that the information sought "is both relevant and likely admissible under [Fed.

12. *Id.*

13. No. IP98-0936-C-H/G, slip op. (S.D. Ind. Jan. 21, 1999).

14. *Id.*

15. No. IP98-1691-C-M/S (S.D. Ind. Apr. 26, 1999).

16. *See id.*

17. *See Meyer v. Mead Johnson Nutritional*, No. EV98-244-C-Y/H (S.D. Ind. Apr. 14, 1999).

18. No. 1:99-MC-19 (N.D. Ind. Oct. 5, 1999).

R. Civ. P.] 26(b)(1)."¹⁹ He noted that the records will show plaintiff's compensation, which is relevant to damages.²⁰ Further, the documents could identify other employers not disclosed to defendant, thus allowing defendant to investigate disciplinary and performance issues to formulate a possible defense. Moreover, because the plaintiff sought damages for emotional injuries, "medical records are relevant as to the Plaintiff's emotional status."²¹

Finally, Judge Cosbey distinguished the unpublished decision from Judge Hamilton in *Perry v. Best Lock Corp.*,²² in which third-party subpoenas were quashed, on the basis that unlike in *Perry* when the defendant served such requests on nineteen former employers, in *Brady* the defendant "has limited its request to the Plaintiff's current and immediate past employers."²³ Judge Cosbey concluded, "Clearly these requests for personnel, employment and medical records are reasonably calculated to lead to relevant, and potentially admissible evidence in response to Plaintiff's Title VII claim, and therefore, the motion to quash must be denied."²⁴

On the other hand, in *Henderson v. The Anthem Companies, Inc.*,²⁵ Magistrate Judge Shields quashed subpoenas issued to third parties in an employment case, reasoning that such requests are invasive of the plaintiff's privacy and must have a factual basis.

B. Seventh Circuit Puts the Squeeze on Protective Orders

Rule 26(c) of the Federal Rules of Civil Procedure provides for protective orders to be issued by federal courts "for good cause shown" if there is "a trade secret or other confidential research, development, or commercial information"²⁶ In recent years, the Seventh Circuit has scrutinized protective orders and has voiced a preference for public access to materials and information discovered in federal litigation. In 1999 the Seventh Circuit issued its most profound opinion yet on this subject.

In *Citizens First National Bank of Princeton v. Cincinnati Insurance Co.*,²⁷ an appeal was taken from the Northern District of Illinois in a commercial case. At the trial court level, the district judge had issued a standard protective order stipulated to by the parties allowing the parties to designate as confidential any document "believed to contain trade secrets or other confidential or governmental

19. *Id.* at *3.

20. *See id.* at *3-4.

21. *Id.* at *4.

22. No. IP98-936-C H/G (S.D. Ind. Jan. 21, 1999).

23. No. 1:99-MC-19, at *4 (N.D. Ind. Oct. 5, 1999).

24. *Id.*

25. IP99-1454-C-Y/S, slip op. (S.D. Ind. Dec. 21, 1999).

26. FED. R. CIV. PROC. 26(c).

27. 178 F.3d 943 (7th Cir. 1999).

information.”²⁸ On appeal, one of the parties asked the Seventh Circuit to file an appendix under seal, and in so doing submitted the stipulated protective order from the district court.

Writing for a panel that included fellow Judges Easterbrook and Bauer, Chief Judge Posner remanded the matter to the district court for purposes of advising whether good cause exists for the appendix to be filed under seal.²⁹ In so doing, Judge Posner expounded on the limits and requirements of Rule 26(c) and the Seventh Circuit’s concerns in this area.

He began by noting that the stipulated protective order had been issued nearly two years ago in March of 1997, and that “we do not know enough about the case to be able to assess the order’s current validity without the advice of the district judge”³⁰ He then added that “[t]here is a deeper issue of confidentiality than the currency of the protective order, and we must address it in order to make clear the judge’s duty on remand.”³¹ That issue, he explained, is the “judge’s failure to make a determination, as the law requires [under] Fed. R. Civ. P. 26(c) . . . , of good cause to seal any part of the record of a case.”³² He explained:

Instead of doing that [finding good cause] he granted a virtual *carte blanche* to either party to seal whatever portions of the record the party wanted to seal. This delegation was improper. The parties to a lawsuit are not the only people who have a legitimate interest in the record compiled in a legal proceeding. It is true that pretrial discovery, unlike the trial itself, is usually conducted in private. But in the first place the protective order that was entered in this case is not limited to the pretrial stage of the litigation, and in the second place the public at large pays for the courts and therefore has an interest in what goes on at all stages of a judicial proceeding.³³

Judge Posner then addressed the balance of the public’s interest versus the litigants interests in privacy, writing, “[t]hat [public] interest does not always trump the property and privacy interests of the litigants, but it can be overridden only if the latter interests predominate in the particular case, that is, only if there is good cause for sealing a part or the whole of the record in that case.”³⁴ There are, he added, limits on the parties’ ability to dictate what is sealed. He elaborated as follows:

The determination of good cause cannot be elided by allowing the parties to seal whatever they want, for then the interest in publicity will

28. *Id.* at 944.

29. *See id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 945.

go unprotected unless the media are interested in the case and move to unseal. The judge is the primary representative of the public interest in the judicial process and is duty-bound therefore to review any request to seal the record He may not rubber stamp a stipulation to seal the record.³⁵

Judge Posner then critiqued the protective order at issue, noting that it was "far too broad to demarcate a set of documents clearly entitled without further inquiry to confidential status."³⁶ After noting that both the First and Third Circuits formerly endorsed broad umbrella orders but have moved away from that position, Judge Posner noted that not all determinations of good cause must be made on a document-by-document basis. He concluded:

In a case with thousands of documents, such a [document-by-document] requirement might impose an excessive burden on the district judge or magistrate judge. There is no objection to an order that allows the parties to keep their trade secrets (or some other properly demarcated category of legitimately confidential information) out of the public record, provided the judge (1) satisfies himself that the parties know what a trade secret is and are acting in good faith in deciding which parts of the record are trade secrets and (2) makes explicit that either party and any interested member of the public can challenge the secreting of particular documents. Such an order would be a far cry from the standardless, stipulated, permanent, frozen, overbroad blanket order that we have here.³⁷

What then are practitioners and the federal trial bench to do with protective orders? The best that can be discerned from Judge Posner's order is the following: (1) there should be a specific explanation of the reasons for any document or category of documents to be deemed confidential; (2) merely saying "good cause" exists is not enough, but an explicit good cause finding is required; (3) the order should recite that either party and any interested member of the public can challenge the secreting of particular documents; and (4) parties should limit the number and type of documents that they designate as confidential.

The last advice, of course, is that appellate counsel should think carefully before proceeding with motions to file materials under seal in the Seventh Circuit itself. The Seventh Circuit has a great interest in the "public's right to know," and Chief Judge Posner himself seems to be the champion of the public's interest in this regard.

35. *Id.*

36. *Id.*

37. *Id.* at 946.

III. EXPERTS

In *Kumho Tire Co. v. Carmichael*,³⁸ the Supreme Court held that the *Daubert* standards for screening expert testimony apply to all types of experts, not merely scientists. The decision resolves a split in the circuits on this front, but does not change things in the Seventh Circuit where the broad application of *Daubert* had previously been recognized.

IV. SUMMARY JUDGMENT

A. Motions to Strike at Summary Judgment

In *Worlds v. Flashfold Carton, Inc.*,³⁹ Magistrate Judge Cosbey granted summary judgment for the employer in a discrimination case. In so doing, Judge Cosbey granted a motion to strike numerous aspects of the plaintiff's evidence submitted in opposition to summary judgment. For instance, one witness asserted in an affidavit that discrimination was "routine" and "very common," but did not provide any foundation or detail.⁴⁰ The court struck such conclusions as unsupported by specific factual support.

B. Local Rules Decision

In *Pike v. Caldera*,⁴¹ the defendant moved for summary judgment. Thereafter, the parties filed a series of collateral motions and briefs related to the motion for summary judgment, including five motions to strike, responses thereto, replies, and even some surreplies. Judge Tinder observed at the outset that "the parties have engaged in extensive and time-consuming satellite litigation over various portions of the amended rule."⁴²

In a thorough, comprehensive opinion spanning fifty-three pages, Judge Tinder went to great lengths to educate the bar on the mechanics of amended Local Rule 56.1. He granted and denied the various motions to strike, but more noteworthy than the results of the order are the lessons from the opinion. Any practitioner filing or opposing summary judgment in the Southern District *must* read the entire opinion; it is the earliest, best, and most thorough discussion of the amended summary judgment rule. This Article cannot do justice to the lengthy opinion, but simply notes the following:

- Pursuant to Local Rule 56.1(f)(1), the factual submissions should consist of concise, numbered sentences with the contents of each sentenced limited as far as practicable to a single factual proposition. Judge Tinder elaborated on this requirement, writing: "If a party seeks to prevent a narrative version of the facts, that should be done

38. 526 U.S. 137 (1999).

39. No.1:98-CV-142, 1999 U.S. Dist. LEXIS 7048 (N.D. Ind. Apr. 2, 1999).

40. *Id.* at *5.

41. 188 F.R.D. 519 (S.D. Ind. 1999).

42. *Id.* at 522.

in the brief. But it is improper to do so in a L.R. 56.1(f) submission. Submissions consisting of numbered *paragraphs*, rather than *sentences*, provide an immediate indication that the litigant has, in all likelihood, incorrectly applied the rule.”⁴³

- Regarding arguments, Judge Tinder noted that all factual submissions filed under L.R. 56.1(f), “should contain concise statements of fact, not extended statements of argument.” Further, he observed that “Local Rule 56.1 was not revised for purposes of extending the page limits in which a litigant may argue the merits of a summary judgment motion.”⁴⁴
- “As a general matter,” Judge Tinder observed, “shorter submissions are better.”⁴⁵
- “Submissions required to comply with L.R. 56.1(f) should contain only material facts. If a party wishes to include facts that are not material, such as background facts, they should be placed in a brief.”⁴⁶
- “Material” for purposes of summary judgment means a fact that is “potentially outcome determinative.”⁴⁷
- Local Rule 56.1 does not state how a party should present objections to the opposing party’s evidence and L.R. 56.1(f) submissions. Judge Tinder expressed no preference between objections/argument in a brief or by a motion to strike. He reads the amended rule, though, as not calling for such objections in the factual submissions and responses themselves. He concludes: “The most efficient way for a court to consider and rule upon objections is to have them grouped in a single location, such as either a section of the party’s summary judgment brief or a motion to strike. It may be helpful (though not required) for a practitioner to make a very brief notation in the L.R. 56.1(f) response/reply submission that the party is lodging an objection, and specifying the location of the discussion of the objection. Such a brief notation would alert the court to the presence of the objection, without cluttering the L.R. 56.1(f) submission with argument.”⁴⁸

43. *Id.* at 525.

44. *Id.* at 524.

45. *Id.* at 525 n.8.

46. *Id.* at 526.

47. *Id.* at 523.

48. *Id.* at 529.

Again, this is a mere sampling of the important lessons from the decision. Practitioners are well advised to study the entire decision and the text of Local Rule 56.1 before their next summary judgment filing. Indeed, as a result of *Pike*, the court amended Local Rule 56.1.

C. New Summary Judgment Local Rule

On December 19, 1999 the judges of the U.S. District Court, Southern District of Indiana, passed amendments to Local Rule 56.1 governing summary judgment practice. The amendments are relatively modest and are designed to clean up certain ambiguities that existed under the Court's new rule that took effect January 1, 1999.

L.R. 56.1—SUMMARY JUDGMENT PROCEDURE

(a) Requirements for Moving Party. A party filing a motion for summary judgment pursuant to Fed. R. Civ. P. 56 must also serve and file the following:

- (1) a Statement of Material Facts (either as a section of the brief or as a separate document), in compliance with L.R. 56.1(f), as to which the moving party contends there is no genuine issue and that entitles the moving party to a judgment as a matter of law;
- (2) to the extent not previously filed, any affidavits and other admissible evidence the moving party relies upon to support the facts material to the motion, including, but not limited to, portions of depositions and discovery responses; and
- (3) a supporting brief.

(b) Requirements for Non-Movant. A party opposing a motion filed pursuant to Fed. R. Civ. P. 56 must, on or before the 30th day after service of the motion, serve and file the following:

- (1) a Response to Statement of Material Facts (either as a section of the brief or as a separate document) in compliance with L.R. 56.1(f) that contains a response to each material factual assertion in the moving party's Statement of Material Facts, and if applicable, a separate Statement of Additional Material Facts that warrant denial of summary judgment;
- (2) to the extent not previously filed, any additional affidavits and other admissible evidence to support material facts the opposing party relies upon under L.R. 56.1(b)(1), including, but not limited to, portions of depositions and discovery responses; and
- (3) an answer brief.

(c) Reply Brief. On or before the 15th day after service of an opposing party's answer brief, the moving party may serve and file a reply brief.

If the opposing party has submitted a Response to Statement of Material Facts and/or a Statement of Additional Material Facts, and if the moving party objects to the cited evidence, the moving party may submit a Reply to Response to Statement of Material Facts and/or a Reply to Statement of Additional Material Facts (either as a section of the brief or as a separate document) containing the objections on or before the due date for filing a reply brief that complies with L.R. 56.1(f)(1) and 56.1(f)(3)-(4).

(d) New Evidence on Reply or Surreply.

- (1) At the time of filing its reply brief, the moving party may supplement its filing of admissible evidence under L.R. 56.1(a)(2) only to the extent such additional evidence responds to the opposing party's Response to Statement of Material Facts and/or Statement of Additional Material Facts, and in compliance with L.R. 56.1(f). Such evidence shall be specifically labeled Statement of Additional Evidence on Reply (either as a section of the brief or as a separate document).
- (2) In the event the moving party submits any additional evidence with its reply brief or objects to the admissibility of evidence cited in opposition to the motion, the non-movant may file a Surreply to Additional Material Facts and/or a surreply brief responding only to the moving party's new evidence and/or objections no later than 7 days after service of the moving party's reply brief. A Surreply to Additional Material Facts shall comply with L.R. 56.1(f) and may be accompanied by additional evidence to the extent it is responsive to the moving party's new evidence and/or objections.
- (3) Other than as specifically set forth above, evidence may not be filed on reply or following reply by either party without leave of Court.

(e) Time for Submission. Any motion for summary judgment shall be filed at such a time as to be fully briefed 120 days before the trial date unless an earlier or later deadline is provided by order (see L.R. 16.1) or the case management plan. Because of the potential impact on the trial date, motions for extension of time to file summary judgment or to serve and file supporting or opposing submissions under L.R. 56.1(b), (c) and (d) must specify the trial date and any other subsequent schedule or date that the extension might affect and must recite any previous extensions of time obtained. Extensions of time shall only be granted for good cause shown. The briefing schedule in this rule applies to any motion for summary judgment, notwithstanding the provisions of Local Rule 7.1.

(f) Requirements for Factual Statements and Responses Thereto.

- (1) **Format and Numbering.** The Statement of Material Facts shall consist of numbered sentences. The Response to Statement of

Material Facts must be numbered to correspond with the sentence numbers of the Statement of Material Facts, preferably with each respective factual statement repeated therein. Any Statement of Additional Material Facts must consist of numbered sentences and start with the next number after the last numbered sentence in the Statement of Material Facts. The Reply to Response to Statement of Material Facts, Reply to Statement of Additional Material Facts, Statement of Additional Evidence on Reply, and Surreply to Additional Material Facts must be numbered in a similar fashion, to correspond to the specific material fact to which they are responsive and with any additional facts numbered consecutively therefrom.

- (2) **Format of Factual Assertions.** Each material fact set forth in a Statement of Material Facts, Response to Statement of Material Facts, Statement of Additional Material Facts, Statement of Additional Evidence on Reply, or Surreply to Additional Material Facts must consist of concise, numbered sentences with the contents of each sentence limited as far as practicable to a single factual proposition. Each stated material fact shall be substantiated by specific citation to record evidence. Such citation shall be by page number and paragraph or line number, if possible.
- (3) **Format of Objections to Asserted Material Facts or Cited Evidence.** Objections to material facts and/or cited evidence shall (to the extent practicable) set forth the grounds for the objection in a concise, single sentence, with citation to appropriate authorities.
- (4) **In addition to filing and exchange of all required documents in hard copy format, whenever possible, the parties should exchange their factual Statements in electronic format on 3.5" computer disk.** In certain cases the Court may ask the parties to submit copies of all summary judgment filings in electronic format.

(g) **Effect of Factual Assertions.** In determining the motion for summary judgment, the Court will assume that the facts as claimed and supported by admissible evidence by the moving party are admitted to exist without controversy, except to the extent that such facts are specifically controverted or objected to in compliance with L.R. 56.1(f). The Court will also assume for purposes of deciding the motion that any facts asserted by an opposing party are true to the extent they are supported by the depositions, discovery responses, affidavits or other admissible evidence.

(h) **Definition of Material Fact.** For purposes of summary judgment, a material fact is a potentially outcome determinative fact.

(i) **Oral Argument or Hearing.** All motions for summary judgment will be considered as submitted for ruling without oral argument or hearing unless a request for such is granted under L.R. 7.5 or the Court otherwise directs.

(j) Notice to Pro Se Litigants. If a party is proceeding pro se and an opposing party files a motion for summary judgment, counsel for the moving party must submit a notice to the unrepresented opposing party that:

- (1) briefly and plainly states that a fact stated in the moving party's Statement of Material Facts and supported by admissible evidence will be accepted by the Court as true unless the opposing party cites specific admissible evidence contradicting that statement of a material fact; and
- (2) sets forth the full text of Fed. R. Civ. P. 56 and S.D. Ind. L.R. 56.1; and
- (3) otherwise complies with applicable case law regarding required notice to pro se litigants opposing summary judgment motions.

(k) Compliance. The Court may, in the interests of justice or for good cause, excuse failure to comply strictly with the terms of this rule.⁴⁹

Practitioners are well advised to carefully study this new rule, and to review it with each summary judgment filing.

D. Effect of Local Summary Judgment Rules

In *Huey v. United Parcel Services, Inc.*,⁵⁰ the Seventh Circuit affirmed summary judgment for defendant, based in part upon the plaintiff's failure to comply with the district court's local rule on summary judgment. The Seventh Circuit reaffirmed that district courts may add operational details to summary judgment practice, and that "judges need not paw over the files without assistance from the parties."⁵¹

V. COSTS

In *Odom v. American Art Clay Co.*,⁵² the employer obtained summary judgment against the employee in her employment discrimination claim. The employer filed a bill of costs pursuant to 28 U.S.C. § 1920, seeking recovery of \$1447.11 in costs. The plaintiff objected, asking the court to exercise its discretion not to order payment of costs because she would suffer "severe economic harm" and her lawsuit was neither frivolous nor malicious.⁵³

Judge Hamilton denied the objection and granted the full costs award. After

49. The new rule, effective January 1, 2000, can be viewed on the court's website (visited Feb. 25, 2000) <www.insd.uscourts.gov>.

50. 165 F.3d 1084, 1085 (7th Cir. 1999).

51. *Id.*

52. No. IP97-1089-C-H/G, slip op. (S.D. Ind. Feb. 11, 1999) available in <<http://www.insd.uscourts.gov/search.htm>> (visited July 27, 2000).

53. *Id.*

noting that costs are recoverable by prevailing parties as a matter “of course” under Rule 54(d)(1), he noted that there is a “strong presumption” in the Seventh Circuit that the prevailing party will recover costs.⁵⁴ Judge Hamilton added, “Generally, only misconduct by a prevailing party worthy of a penalty or the losing party’s inability to pay will suffice to justify denying costs.”⁵⁵ Here, though, there was no indication of misconduct on the part of the employer, and the plaintiff failed to show that “the costs sought are beyond her ability to pay within a reasonable period of time.”⁵⁶ The court concluded, “The costs awarded here, it should be noted, are a minor fraction of the overall resources (including attorneys’ time and the court’s time) devoted to the plaintiff’s lawsuit, which was without merit. If the case had been frivolous or malicious, of course, the consequences would have been quite different.”⁵⁷

Similarly, in *Miller v. Town of Speedway*,⁵⁸ defendant obtained summary judgment against the plaintiff in an employment discrimination case and sought to recover \$1880 in costs under 28 U.S.C. § 1920. The plaintiff objected, asserting that the case was “close and difficult.”⁵⁹ Judge McKinney overruled the objection and awarded full costs, noting the strong presumption that a prevailing party should recover costs. Quoting Seventh Circuit precedent, Judge McKinney wrote, “Generally, only misconduct by the prevailing party worthy of a penalty or the losing party’s inability to pay will suffice to justify denying costs.”⁶⁰

VI. APPEALS

A. *Be Careful in the Seventh Circuit*

For those who take appeals to the Seventh Circuit, there are many traps for the unwary. When counsel fails to strictly comply with applicable rules of procedure, the Seventh Circuit can be a harsh place. One of the most frequent errors in Seventh Circuit practice—and thus one of the most common bases for sanctions on appeal—is Seventh Circuit Rule 30(c). Although simple on its face, this rule is frequently violated. During 1999, several appellate counsel found themselves in violation of this important rule, and faced the consequences as a result.

First, in *Normand v. Orkin Exterminating Co.*,⁶¹ in an opinion authored by Chief Judge Posner, the Seventh Circuit ordered appellate counsel to show cause within fourteen days why he should not be fined \$1000 for his violation of

54. *Id.* at 1 (citing *Contreras v. City of Chicago*, 119 F.3d 1286, 1295 (7th Cir. 1997)).

55. *Id.* at 1.

56. *Id.* at 2.

57. *Id.*

58. No. IP97-1707-C-M/S, slip op. (S.D. Ind. Aug. 30, 1999).

59. *Id.*

60. *Id.*

61. 193 F.3d 908, 912 (7th Cir. 1999).

Circuit Rule 30(c). Then, in *Cullen v. Olin Corp.*,⁶² the court issued a similar order to show cause why sanctions should not be levied against another appellate lawyer for violating Circuit Rule 30(c). The *Normand* opinion is brief on the Rule 30(c) issue, but the *Cullen* opinion offers an excellent summary of the Rule 30(c) problem that confronts Seventh Circuit practitioners. The court wrote:

Under Circuit Rule 30(b)(1). . . the appellant has the unambiguous duty to include in the Appendix "all opinions, orders, or oral rulings in the case that address the issues sought to be raised." In this case appellant's counsel failed to comply with Circuit Rule 30 when he failed to attach the district court's ruling concerning motions in limine as well as the trial judge's final evidentiary ruling. To add insult to injury, counsel falsely certified that he complied with Circuit Rule 30. We have repeatedly warned appellants and their counsel that failure to follow the clear requirements of Rule 30 is subject to appropriate sanctions. Failure to attach the necessary documents impairs the ability of the court to thoroughly consider all issues raised, for we "cannot consider arguments that the lower court was incorrect and should be reversed if the written orders and transcript pages containing the appealed decisions are not before us." Accordingly, we are issuing an order to show cause why appellant's counsel should not be sanctioned for his disregard of this circuit's rules.⁶³

These decisions are the most recent examples of the high expectations the Seventh Circuit has for its bar. Before venturing into the Seventh Circuit, counsel must read, re-read, and fully understand the Federal Rules of Appellate Procedure and the Seventh Circuit Rules. Further, peer review of Seventh Circuit filings by someone with Seventh Circuit experience is highly recommended. Unlike some courts, the Seventh Circuit demands exacting compliance with its rules and procedures. The penalty for non-compliance range from forfeiture of a party's rights, to public reprimand, to monetary sanctions.

B. Is a Discovery Order Requiring Payment of Fees a Final Decision?

In *Cunningham v. Hamilton County*,⁶⁴ the Supreme Court held unanimously that an order imposing sanctions on an attorney pursuant to Fed. R. Civ. P. 37(a)(4) is not a "final decision" immediately appealable under 28 U.S.C. § 1291. To pursue such an appeal prior to final judgment, certification of the order for interlocutory appeal under 28 U.S.C. § 1292 is necessary, and such certification decisions are discretionary.

C. Length of Briefs in Multi-Party Appeals

Under Seventh Circuit Rule 33, when multiple parties with identical interests

62. 195 F.3d 317, 322 (7th Cir. 1999).

63. *Id.* (citations omitted).

64. 527 U.S. 198 (1999).

appear on the same side of an appeal, the Seventh Circuit generally enters an order requiring a single joint brief within the standard 14,000 word limit (approximately fifty pages). In multi-defendant criminal appeals with simple issues, the Seventh Circuit will allow each defendant to go his own way and file a separate brief. In complex multi-defendant criminal appeals, however, the court usually requires a joint brief on common issues, and then allows individual briefs on truly individual issues.

In *United States v. Torres*,⁶⁵ four defendants appealed their criminal convictions. Each filed their own brief, and the government then asked for leave to file an over-sized appellee's brief. The Seventh Circuit responded by ordering the four defendants to file a new single joint brief not to exceed 20,000 words, and ordered that no individual briefs would be accepted. The court allowed the government an additional 2000 words beyond the standard 14,000 limit, and also ordered defendants to file a joint reply brief of no more than 8000 words.⁶⁶

The *Torres* decision serves as a reminder that in multi-party appeals, counsel should resolve these briefing issues prior to filing individual briefs, and that counsel should otherwise anticipate and plan for the filing of a joint brief on common issues.

D. Frivolous Appeals

In *Day v. Northern Indiana Public Service Corp.*,⁶⁷ the plaintiff appealed from Judge Lozano's grant of summary judgment, which had been granted in part based on the plaintiff's failure to follow the local rule on summary judgment. On appeal, the Seventh Circuit affirmed, and imposed sanctions of \$500 and a public reprimand of appellant's counsel.⁶⁸ The Seventh Circuit found such sanctions necessary because counsel had violated Circuit Rule 28(c) in his brief (requiring non-argumentative statement of facts supported by citations), and because the appeal otherwise was frivolous.⁶⁹

E. Error Preservation

In *Wilson v. Williams*,⁷⁰ the Seventh Circuit considered the issue whether an objection at trial is required to preserve error on appeal where the trial court ruled on the evidence issue in response to a motion in limine before trial. Judge Easterbrook summarized the ruling of the majority:

We conclude that a definitive ruling in limine preserves an issue for appellate review, without the need for later objection—but this is just a presumption, subject to variation by the trial judge, who may indicate

65. 170 F.3d 749 (7th Cir. 1999).

66. *See id.* at 751.

67. 164 F.3d 382 (7th Cir. 1999).

68. *See id.* at 385.

69. *See id.*

70. 182 F.3d 562 (7th Cir. 1999) (en banc).

that further consideration is in order. Moreover, issues about how the evidence is used, as opposed to yes-or-no questions about admissibility frequently require attention at trial, so that failure to object means forfeiture.⁷¹

The court also noted that: "Conclusive pretrial rulings on evidence serve another useful end: they permit the parties to adjust their trial strategy in light of the court's decisions."⁷² Thus, the court stated, if the court made a definitive ruling in limine that certain evidence was admissible, the party resisting admission of the evidence could present that evidence at trial ("if only to draw its sting," as the court put it) without waiving the objection to admissibility.⁷³

VI. MISCELLANEOUS

In *Pettis v. Alexander*,⁷⁴ defense counsel moved to withdraw their appearance five weeks prior to trial due to non-payment of fees stemming from financial difficulties. The court denied the motion, relying on Rule 1.16(b)(4) of the Indiana Rules of Professional Conduct. The rule governs withdrawals from representation, but gives courts the power to order counsel to continue their representation.

Judge Hamilton followed existing precedent on the issue and reasoned: (1) the client did not consent to withdraw; (2) no substitute counsel had appeared; (3) the plaintiff's right to a trial would be impeded if withdrawal were allowed because a continuance would be necessary.⁷⁵ He concluded:

If the court must choose between imposing financial burdens on defendant and/or its lawyers, on the one hand, or imposing delays and disruption on the opposing party and the court on the other hand, the choice is clear. Any hardships should be imposed on those directly involved in the contractual relationship that has broken down, rather than on the court and the plaintiff.⁷⁶

VII. RULE AMENDMENTS

The Southern District of Indiana passed amendments to sixteen of its Local Rules, effective January 1, 2000.⁷⁷ The amendments are the result of a year-long audit of all the Local Rules by the Court's Local Rules Advisory Committee. Most of the amendments are in the nature of "housekeeping" changes that will

71. *Id.* at 563.

72. *Id.* at 566.

73. *Id.*

74. No. IP97-1969-C-H/G, slip op. (S.D. Ind. May 5, 1999).

75. *See id.*

76. *Id.*

77. The full text of all changes is available at the court's website (visited Feb. 25, 2000) <<http://www.insd.uscourts.gov>>.

not significantly impact practitioners. Several rule changes, however, will have immediate impact on local federal practice. The most important changes are outlined below.

A. Format of Filings

Local Rule 5.1 is substantially revised, with the key amended language set forth as follows:

In order that the files of the Clerk's office may be kept under the system commonly known as "flat filing," all papers presented to the Clerk or Judge for filing shall be flat and unfolded. All filings shall be on white paper of good quality, 8 ½" x 11" in size, and shall be plainly typewritten, printed, or prepared by a clearly legible duplication process, and double spaced, except for quoted material. The filings shall be either stapled in the top left corner or bound in a manner which permits the document to lie reasonably flat when open (*e.g.*, spiral bound), and shall be two-hole punched at the top (but not fastened) (the punches shall be 2 ¾" apart and appropriately centered). Should the nature of the filing be so unusual as to make these methods of fastening infeasible, a party may seek leave of the Court to use a different method. Such leave shall be sought prior to the submission of any filing fastened in any way not conforming to this Rule. The title of each filing must be set out on the first page. Each page shall be numbered consecutively. Any filing containing four or more exhibits shall include a separate index identifying and briefly describing each exhibit.⁷⁸

As amended, the rule requires filings to be two-hole punched at the top center of the page. This system will facilitate filing at the Clerk's office, which uses two-hole files. Compliance with the amended rule should be easy. In addition to manual two-hole punches, practitioners can purchase pre-punched paper from office supply stores or distributors.

B. Extensions of Time

Local Rule 6.1 is amended to clarify that notices of extensions (as opposed to motions) are only appropriate for deadlines relating to responsive pleadings and written discovery requests. All other extensions must be by motion. In addition, all notices and motions for extensions must recite whether opposing counsel consents or objects to the extension, and must state the original due date and the new due date. The full text of amended Local Rule 6.1 follows:

(a) In every civil action pending in this Court in which a party wishes to obtain an initial extension of time not exceeding thirty (30) days within which to file a responsive pleading or a response to a written request for discovery or request for admission, the party shall contact counsel for

78. S.D. IND. LOCAL Rule. 5.1.

the opposing party and solicit opposing counsel's agreement to the extension. In the event opposing counsel does not object to the extension or cannot with due diligence be reached, the party requesting the extension shall file a notice with the Court reciting the lack of objection to the extension by opposing counsel or the fact that opposing counsel could not with due diligence be reached. No further filings with the Court nor action by the Court shall be required for the extension.

(b) Any other request for an extension of time, unless made in open court or at a conference, shall be made by written motion. In the event the opposing counsel objects to the request for extension, the party seeking the same shall recite in the motion the effort to obtain agreement.

(c) Any motion or notice filed pursuant to this rule shall state the original due date and the date to which time is extended.⁷⁹

C. Core Elements

Under the Pilot Program administered by Magistrate Judge Shields, core jury instructions were required with the case management plan. As the Pilot Program winds down, a modification of that concept is now part of Local Rule 16.3(d)(2), and requires in each case management plan the following: "The plan shall set forth the contentions of the parties, including a brief description of the parties' claims and defenses. The plan shall include the essential legal elements of each claim or defense upon which a party bears the burden of proof."⁸⁰

D. Deadline for Bill of Costs Shortened to Fourteen Days

Under prior Local Rule 54.1, a bill of costs was due thirty days after judgment. This time period was longer than the fourteen-day attorneys fee period of Fed. R. Civ. P. 54, and was inconsistent with the Northern District's fourteen-day period for costs under its Local Rule 54.1. To make the deadline for costs consistent with the deadline for fees, and to harmonize this local rule with the Northern District, the Southern District's amended Local Rule 54.1 requires bills of costs to be filed fourteen days after judgment, as follows:

Except as otherwise provided by statute, rule, or Court order, the parties shall have 14 days from the entry of final judgment to file and serve a Bill of Costs and a motion for the assessment of attorney fees. The Court prefers that any Bill of Costs be filed on AO form 133, which is available from the Clerk. This time may be extended by the Court for good cause shown. Failure to file such bill or motion or to obtain leave of Court for extensions of time within which to file shall be deemed a

79. S.D. IND. L.R. 6.1.

80. S.D. IND. L.R. 16.3.

waiver of the right to recover taxable costs or attorney fees.⁸¹

E. Preliminary Injunctions/TROs

Local Rule 65.2 was amended to remove the obligation of filing a supporting brief with a motion for preliminary injunction. The change recognizes that in many preliminary injunction settings, as the time the motion is filed the matter is often premature for briefing until certain discovery has taken place. Under the amended rule, supporting briefs remain mandatory for TROs, but are implicitly optional and/or left to the Court's discretion and scheduling in a given case in the preliminary injunction context. The full text of the amended Local Rule 65.2 follows:

The Court will consider a request for preliminary injunction or for a temporary restraining order only when the moving party files a separate motion for such relief. If the motion is for a temporary restraining order, in addition to fully complying with all the requirements of *Federal Rule of Civil Procedure* 65(b), the moving party shall also file with its motion a supporting brief.⁸²

CONCLUSION

During 2000, additional developments in federal civil practice are anticipated. In particular, a package of amendments to the Federal Rules of Civil Procedure is working its way through to approval, and would take effect December 1, 2000. The most significant changes would be to mandatory disclosure under Fed. R. Civ. P. 26(a)(1) and to discovery. Practitioners should watch for these changes, which will be reported in next year's Article.

81. S.D. IND. L.R. 54.1.

82. S.D. IND. L.R. 65.2.

STATE AND FEDERAL CONSTITUTIONAL LAW DEVELOPMENTS

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INTRODUCTION

This Article explores key state and federal constitutional law developments over the past year. Part I examines state constitutional law cases, while the remaining materials focus on state and federal court cases that raise significant and recurring federal constitutional issues.

I. DEVELOPMENTS UNDER THE STATE CONSTITUTION

For several years, Chief Justice Randall T. Shepard has urged Indiana practitioners to re-examine the Indiana Constitution as a potential source for the protection of civil liberties.¹ On the other hand, the Indiana Supreme Court is clearly not anxious to usurp the general assembly's legislative role, and it has repeatedly cautioned that state statutes will be presumed constitutional and that the challenger carries a heavy burden of proof.² In *Martin v. Richey*,³ the court, in a 3-2 decision, struck the balance between these competing concerns by leaving intact on its face Indiana's two-year occurrence-based medical malpractice statute of limitations.⁴ The court held, however, that the statute is

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1. See Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575 (1989).

2. See, e.g., *Collins v. Day*, 644 N.E.2d 72, 80 (Ind. 1994).

3. 711 N.E.2d 1273 (Ind. 1999).

4. See *id.* at 1284.

unconstitutional as applied to a plaintiff who suffered from a medical condition with a long latency period that prevented her from discovering the alleged malpractice within the two-year period.⁵

Martin claimed that Dr. Richey committed malpractice when he told her that a suspicious lump in her breast was benign based on a needle aspiration he performed. He also allegedly failed to tell her that she needed to follow up with an excisional biopsy and, in fact, had her cancel an appointment she had made for this procedure.⁶ Three years later, when she discovered that she had breast cancer and that it had spread to her lymph nodes, she sued Dr. Richey. The trial court held that her claim was time barred because the two-year statute of limitations for malpractice ran from the date of "occurrence," not discovery.⁷ The court of appeals reversed, finding that the different treatment of medical malpractice victims from other tort victims who enjoy a discovery-based statute of limitations violates article I, section 23 of the state constitution,⁸ which provides that "[t]he General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens."⁹ In addition, the appellate court held that the statute violated article I, section 12 of the state constitution,¹⁰ which guarantees that a remedy "by due course of law" is available to anyone "for injury done to him in his person, property, or reputation."¹¹ The Indiana Supreme Court agreed that application of the statute of limitations violates both of these constitutional provisions, although it rejected the appellate court's decision to strike the statute as unconstitutional on its face.¹² The decision nonetheless has potentially broad implications because it is the first case in recent years in which either of these constitutional provisions has been successfully invoked. More specifically, all earlier challenges to Indiana's Medical Malpractice statute under the state constitution were soundly rejected.¹³ Thus, Justice Selby faced the difficult task of reconciling her decision with past case precedent.

Addressing the article I, section 23 claim, Justice Selby turned to *Collins v. Day*,¹⁴ in which the Indiana Supreme Court rejected federal equal protection analysis in favor of an interpretation more faithful to the text and the express purpose and intent of the framers of this state provision.¹⁵ To pass muster under section 23, the disparate treatment must be (1) reasonably related to inherent characteristics that distinguish the unequally treated classes and (2) the

5. *See id.*

6. *See id.* at 1275.

7. *Id.* at 1278 (construing IND. CODE § 34-18-7-1(b) (1998)).

8. *See id.* at 1277.

9. IND. CONST. art I, § 23.

10. *See Martin*, 711 N.E.2d at 1277.

11. IND. CONST. art I, § 12.

12. *See Martin*, 711 N.E.2d at 1281.

13. *See id.* at 1283.

14. 644 N.E.2d 72 (Ind. 1994).

15. *See id.* at 75.

preferential treatment must be uniformly applicable and equally available to all persons similarly situated.¹⁶ The Indiana Supreme Court in *Collins* emphasized that substantial deference must be given to the legislative judgment, which should be invalidated only "where the lines drawn appear arbitrary or manifestly unreasonable."¹⁷ Until *Martin*, all attempts to invalidate state legislative enactments under article I, section 23 had been unsuccessful because of this highly deferential approach.¹⁸

In *Martin*, the plaintiff argued that victims of medical malpractice are treated differently than other tort victims where the statute of limitations runs from the date that the plaintiff knew or, in the exercise of ordinary diligence, could have discovered that an injury had been sustained as a result of tortious conduct.¹⁹ As to the first prong of *Collins*, the Indiana Supreme Court ruled that the disparate treatment was "reasonably related to characteristics" that distinguished the two groups.²⁰ The Indiana Supreme Court reached this same conclusion and upheld the statute in 1980, finding that the limitations period was rationally related to the legitimate legislative goal of maintaining sufficient medical treatment and controlling medical malpractice insurance costs by encouraging the prompt presentation of claims and shielding providers from having to defend against stale claims.²¹ Although these rulings preceded *Collins*, the highly deferential approach applied post-*Collins* suggested that no more than a rational basis was needed to sustain the law.

Thus, the Indiana Supreme Court in *Martin* concluded, as it did in 1980, that the classification scheme is reasonably related to legitimate state goals.²² Although a classification may later cease to satisfy the requirement of section 23 because of intervening changes, nothing in the record warranted re-examination of the legitimacy of the legislative goal underlying the Medical Malpractice Act or its statute of limitations.²³

16. See *id.* at 78-79.

17. *Id.* at 80.

18. See *Rondon v. State*, 711 N.E.2d 506, 513 (Ind. 1999) (refusal to retroactively apply statutory exemption from death penalty for mentally retarded individuals does not violate Equal Privileges and Immunities Clause with regard to defendant convicted of felony murder and sentenced to death before statute's effective date); see also *Indiana High Sch. Athletic Ass'n v. Carlberg*, 694 N.E.2d 222, 240 (Ind. 1997) (IHSA Transfer Rule that gives students who change residence with their parents immediate full varsity eligibility at new school while denying such to students who move without their parents is rationally related to the goal of deterring athletically motivated transfers and the prohibitive cost of monitoring the motives of every transfer).

19. See *Martin*, 711 N.E.2d at 1277.

20. *Id.* at 1281-82.

21. See *Rohrbaugh v. Wagoner*, 413 N.E.2d 891, 894-95 (Ind. 1980); *Johnson v. St. Vincent Hosp.*, 404 N.E.2d 585 (Ind. 1980), *abrogated by Collins v. Day*, 644 N.E.2d 72 (Ind. 1994).

22. The court initially acknowledged that section 23 applies regardless of whether a statute grants unequal privileges or imposes unequal burdens. See *Martin*, 711 N.E.2d at 1280.

23. See *id.* at 1281.

As to the second prong of *Collins*, the Indiana Supreme Court agreed with the lower court's observation that victims of medical negligence who are unable to discover their injury/malpractice before the expiration date of the two-year statute of limitations are treated differently than those able to do so, but it disagreed that this provided grounds to invalidate the statute on its face.²⁴ Rather than compare victims of medical malpractice with victims of other tortious conduct, Justice Selby focused on a subclass of medical malpractice victims who cannot discover their injury during the statutory limitation period.²⁵ She notes that on its face, the statutory provisions do not expressly create "the assertedly unfair or disadvantaged subclassification of medical malpractice plaintiffs."²⁶ It is only *as applied* to this sub-class who are unable to file any claim at all that the statute fails the "uniformly applicable" standard of *Collins*.²⁷ Further, it is only with regard to this subclassification that the statutory goal of lowering medical costs by encouraging the prompt filing of claims becomes irrational.²⁸ The supreme court thus limited its holding as follows:

[P]laintiff cannot be foreclosed from bringing her malpractice suit when, unlike many other medical malpractice plaintiffs, she could not reasonably be expected to discover the asserted malpractice and resulting injury within the two-year period given the nature of the asserted malpractice and of her medical condition.²⁹

Although this passage appears to reach only an "unconstitutional as applied" determination, Chief Justice Shepard, in dissent, opines that he cannot envision any cases where the statute could be constitutional.³⁰ He explains that the very purpose of the statute is "to adopt an event-based limit rather than a discovery-based limit."³¹ If the majority finds that the law is unconstitutional as to those who cannot promptly discover their injury, in essence it has invalidated the occurrence-based limit and the law cannot stand. This would be clearly contrary to a long line of cases rejecting this same constitutional challenge. Although the majority purports to limit its decision to the malpractice victim who suffers from a "medical condition with a long latency period" that prevents early discovery, the crux of the holding is the impermissibility of applying the statute to any malpractice victim who could not with due diligence discover the tort at an earlier point in time.³² On the other hand, by taking an "as applied" approach, Justice Selby leaves intact the 1980 decisions upholding the limitations period, while preventing the arbitrary result of denying Martin the right to pursue her

24. *See id.*

25. *See id.*

26. *Id.*

27. *Id.*

28. *See id.*

29. *Id.* at 1282.

30. *See id.* at 1286 (Shepard, C.J., dissenting).

31. *Id.*

32. *Id.* at 1277.

claim.

As to the article I, section 12 claim, the appellate court ruled that the occurrence-based medical malpractice statute of limitations was an "unconstitutional abrogation of the right to a complete tort remedy" guaranteed by this provision.³³ The Indiana Supreme Court rejected this rationale, again refusing to invalidate the statute on its face and declining "to formulate a rule of constitutional law broader than is required by the precise facts at issue."³⁴ Justice Selby acknowledged a long line of cases allowing the legislature to modify or abrogate common law rights, including cases specifically sustaining the medical malpractice statute of limitations against a facial challenge under section 12.³⁵ As in the case of its article I, section 23 analysis, the supreme court instead ruled that the statute was unconstitutional *as applied* to a plaintiff who has "no meaningful opportunity to file an otherwise valid tort claim within the specified statutory time period."³⁶ The court reasoned that to deny a cause of action under circumstances where the "plaintiff did not know or, in the exercise of reasonable diligence, could not have discovered that she had sustained an injury as a result of malpractice . . . would impose an impossible condition on plaintiff's access to courts and ability to pursue an otherwise valid tort claim."³⁷ Under the circumstances of this case where plaintiff was unaware she had a malignancy and Dr. Richey assured her that the mass was just indicative of non-life threatening fibrocystic breast disease, application of the statute of limitations would, in essence, require plaintiff "to file a claim before such claim existed."³⁸

Although the supreme court cautioned that Indiana citizens do not have a "fundamental right"³⁹ of access to the courts, nor a fundamental right to a complete tort remedy, the decision is significant in that it represents the first case in twenty-two years in which a plaintiff has successfully invoked this provision. In 1977, in *City of Fort Wayne v. Cameron*,⁴⁰ the Indiana Supreme Court ruled that an occurrence-based notice provision, requiring the city to be placed on notice within sixty days of alleged tortious conduct, was unconstitutional as applied to a plaintiff who was mentally and physically incapacitated during the statutory notice period. Application of the law under such circumstances would deprive a litigant of his constitutional right to a remedy by due course of law.⁴¹ However, case law since *Cameron*, including some six decisions cited by Justice Sullivan in a concurring opinion in *Martin*, specifically rejected the claim that the Medical Malpractice Act's statute of limitations violates article I, section

33. *Id.* at 1282 (quoting *Martin v. Richey*, 674 N.E.2d 1015, 1026 (Ind. Ct. App. 1997)).

34. *Id.*

35. *See id.* at 1283.

36. *Id.* at 1284.

37. *Id.*

38. *Id.* at 1285.

39. *Id.* at 1283.

40. 370 N.E.2d 338 (Ind. 1977).

41. *See id.* at 341.

12.⁴² In fact, three years after *Cameron*, the Indiana Supreme Court in *Rohrbaugh v. Wagoner*⁴³ rejected a similar state constitutional challenge under sections 12 and 23, to the limitations period regarding minors. Justice DeBruler acknowledged the potential arbitrariness of the statute, but nonetheless emphasized that statutes are presumed constitutional.⁴⁴ It sufficed that the classification scheme was generally accurate: "There can be no doubt that this measure is a stern one and will have harsh application in individual cases. However, a court has no authority to annul a statute because of that fact."⁴⁵ The same words could have been written to describe the plight of Melody Martin.

Thus, despite the majority's reluctance to use sections 12 and 23 to invalidate the statute on its face, its decision breathes new life into these provisions, inviting practitioners to invoke the state constitution in cases where a statute creates irrational distinctions or "imposes an impossible condition" that operates to arbitrarily deny a remedy for the violation of common law rights. On the other hand, it should be noted that only two Justices, Dickson and Boehm, joined in Justice Selby's opinion in *Martin*. Justice Sullivan concurred in *Martin* based solely on the existence of fact questions regarding plaintiff's claim that the statute of limitations should be tolled based on the doctrine of active fraudulent concealment.⁴⁶ He specifically rejected the state constitutional arguments and contended, together with Chief Justice Shepard, that case precedent dictates that the statute is valid.⁴⁷ Since Justice Selby has stepped down from the court, the future of state constitutional arguments brought under section 12 or section 23 remains in doubt.⁴⁸

The Indiana Supreme Court further explicated its *Martin* decision in a companion case, *Van Dusen v. Stotts*.⁴⁹ In that case, the plaintiff, William Stotts, was told by a physician that, based on a needle biopsy, his tumor was benign. Two and one-half years later, Stotts learned that he had incurable prostate cancer. The doctor told Stotts that the initial biopsy may have been improperly read.⁵⁰ Like the plaintiff in *Martin*, he was unable to discover the malpractice and the resulting injury within the two-year statutory period.⁵¹ The supreme court explained that plaintiffs in such circumstances may file their claims within two years of the date when they discover the malpractice and the resulting injury or facts that, in the exercise of reasonable diligence, should lead to the discovery of

42. See *Martin*, 711 N.E.2d at 1285 (Sullivan, J., concurring).

43. 413 N.E.2d 891, 894-95 (Ind. 1980).

44. See *id.* at 895.

45. *Id.*

46. See *Martin*, 711 N.E.2d at 1285 (Sullivan, J., concurring).

47. See *id.* at 1285-86.

48. Newly appointed Justice Robert Rucker, while sitting on the court of appeals, did not participate in any lower court opinions addressing these constitutional provisions.

49. 712 N.E.2d 491 (Ind. 1999).

50. See *id.* at 494.

51. See *id.*

the malpractice and the resulting injury.⁵² The supreme court acknowledged that its analysis may raise difficult factual questions as to when a plaintiff should have discovered the injury.⁵³ It noted that “[although] a plaintiff’s lay suspicion that there may have been malpractice is not sufficient to trigger the two-year period[,] . . . a plaintiff need not know with certainty that malpractice caused his injury.”⁵⁴ Further, “when it is undisputed that plaintiff’s doctor has expressly informed a plaintiff that he has a specific injury and that there is a reasonable possibility . . . that . . . [it] was caused by a specific act at a specific time,” the plaintiff will be “deemed to have sufficient facts to require him to seek promptly any additional medical or legal advice needed to resolve any remaining uncertainty . . . regarding the cause of his injury.”⁵⁵ In this case, once the doctor informed the plaintiff that he had prostate cancer and that it was possible that the biopsy of the tumor was misread, the two-year period was triggered.⁵⁶ Plaintiff’s complaint was filed within two years and was therefore timely. In short, *Martin* and *Van Dusen* read together mean that as to those who reasonably fail to discover the malpractice within two years, the limitations period will be tolled until discovery, from which point plaintiff is entitled to two years in which to bring a lawsuit. Because “discovery” arguably may not occur until several years after the occurrence of medical malpractice, the Act’s stated goal of creating some certainty regarding the duration of liability of doctors and health care providers has been thwarted. On the other hand, several malpractice victims have already benefitted from these rulings.⁵⁷

Although *Martin* found the statute of limitations to be unconstitutional only as applied to a sub-class of individuals who could not, with due diligence, have discovered the malpractice until after the two years had run, an appellate court has extended this analysis to save a claim brought by a victim who learned of the malpractice within the two-year period but who did not file a complaint until after the limitations period lapsed. In *R.C. Boggs v. Tri-State Radiology*,⁵⁸ the plaintiff went in for a mammogram in July 1991, and was told there was no abnormality. When she returned for her annual mammogram in July 1992 she

52. See *id.* at 495.

53. See *id.* at 499.

54. *Id.*

55. *Id.*

56. See *id.*

57. See *Harris v. Raymond*, 715 N.E.2d 388 (Ind. 1999) (holding that plaintiff who did not discover that her dental implant was defective until years later because her physician failed to inform her that the FDA had issued a safety alert regarding this product, could not, like *Martin*, have discovered the problem during the limitations period and thus application of the statute of limitations would deprive her of a claim before she had any reason to know it existed); see also *Weinberg v. Bess*, 717 N.E.2d 584 (Ind. 1999) (holding that because plaintiff had no reason to suspect that her doctor gave her silicone rather than the saline breast implants she requested, her filing of a complaint two months after she discovered the truth in her medical records fell within the statutory period); *Halbe v. Weinberg*, 717 N.E.2d 876 (Ind. 1999) (same fact pattern as *Bess*).

58. 716 N.E.2d 45 (Ind. Ct. App. 1999), *aff’d*, 730 N.E.2d 692 (Ind. 2000).

learned she had Stage IV breast cancer and, in fact, she died one year later at the age of fifty-two.⁵⁹ Her estate filed a claim in July 1994, within two years of having discovered the malpractice, but three years after the occurrence. The court conceded that applying the limitations period to this claim would not violate section 12.⁶⁰ Unlike Martin, R.C. was not denied a meaningful opportunity to bring a claim since she had eleven months from the time the malpractice was discovered in which to file her lawsuit.⁶¹ However, the court proceeded to find that application of the statute under these circumstances would still violate section 23.⁶² Although application of the two-year rule to individuals like R.C. does not harm members of a subgroup who could not discover the malpractice within the statutory period, it nonetheless creates two subclasses who are treated differently without any rational justification.⁶³ A strict reading of *Martin* means that only those who cannot discover the malpractice within the statutory period enjoy two years from the actual date of discovery to file a lawsuit. Others, like R.C., who discover the malpractice within the two years, even if it is one day or one hour before the end of the two-year period, may lose their claim if they fail to act immediately. By focusing attention on victims who discover the malpractice one day before versus one day after the two-year limitations period, the irrationality of denying R.C. relief becomes apparent.⁶⁴

The general reluctance of the Indiana Supreme Court to explore state constitutional arguments is reflected in its decision in a recent defamation case. In *Journal-Gazette Co. v. Bandido's, Inc.*,⁶⁵ the supreme court was asked to re-examine Indiana libel law, which mandates that all victims of libelous material which is "newsworthy" must meet an "actual malice" standard, that is, they must prove at minimum that the false material was published with reckless disregard for its truth in order to recover. In 1974, an appellate court in *AAFCO Heating & Air Conditioning Co. v. Northwest Publications Inc.*,⁶⁶ rejected the notion that private victims of libel, as opposed to public officials or public figures, should be able to maintain suits based merely on a negligence theory.⁶⁷ Six months earlier the U.S. Supreme Court in *Gertz v. Robert Welch, Inc.*,⁶⁸ had held that private victims of libel deserved greater protection and should not be held to the actual malice test.⁶⁹ The U.S. Supreme Court reasoned that private individuals do not ordinarily voluntarily relinquish their right to be free from defamatory

59. See *id.* at 46.

60. See *id.* at 48.

61. See *id.* at 47.

62. See *id.* at 49.

63. See *id.*

64. See *id.* at 50.

65. 712 N.E.2d 446 (Ind. 1999), *cert. denied*, 120 S. Ct. 499 (1999).

66. 321 N.E.2d 580 (Ind. Ct. App. 1974).

67. See *id.* at 586.

68. 418 U.S. 323 (1974).

69. See *id.* at 343-44.

material, like public figures or public officials.⁷⁰ Thus, although states cannot impose strict liability, they may allow private citizens to recover in a libel suit by merely proving negligence.⁷¹ Although individual states retained the option of imposing a stricter standard more protective of the press, all but four states adopted the negligence standard for private victims of libel.⁷² In Indiana, *AAFCO* remained the law.

Since 1974, *AAFCO*'s actual malice rule has been justified by invoking article I, section 9 of the state constitution that broadly guarantees free expression "on any subject whatever," but which also admonishes that speakers may be held accountable "for abuse of that right."⁷³ In urging the Indiana Supreme Court to reverse *AAFCO*, plaintiffs relied on the "abuse" clause as well as article I, section 12 of the state constitution, which specifically guarantees a remedy by due course of law for injury to reputation.⁷⁴ The majority in *Bandido*'s refused to enter the quagmire of interpreting these two competing constitutional provisions. Instead, the court in *Bandido*'s, without invoking section 9, simply acknowledged *AAFCO* as the well-established defamation law of Indiana.⁷⁵ Justice Dickson, dissenting in *Bandido*'s, addressed the constitutional issues. He argued that tortious defamation is an abuse of the right to free expression and thus is not protected by section 9 of article I of the Indiana Constitution.⁷⁶ Further, he relied on article I, section 12 to support his view that private victims of libel should be able to recover on a negligence, rather than an actual malice, standard.⁷⁷

70. See *id.* at 344-45.

71. See *id.* at 346-48.

72. Other than Indiana, only Alaska, Colorado and New Jersey still use the "actual malice" standard for private victims of libel. See *Gay v. Williams*, 486 F. Supp. 12, 15 (D. Alaska 1979); *Diversified Management, Inc. v. Denver Post, Inc.*, 653 P.2d 1103, 1106 (Colo. 1982); *Sisler v. Gannett Co.*, 516 A.2d 1083, 1095 (N.J. 1986), *aff'd on reh'g*, 536 A.2d 299 (N.J. Super. Ct. App. Div. 1987).

73. *Near East Side Community Org. v. Hair*, 555 N.E.2d 1324 (Ind. Ct. App. 1990).

74. Article I, section 12 of the Indiana Constitution guarantees a remedy "[for] every person, for injury done to [an individual's] . . . person, property or reputation . . . by due course of law." IND. CONST. art. I, § 12.

75. See *Journal-Gazette Co. v. Bandido's Inc.*, 712 N.E.2d 446, 469 (Ind. 1999), *cert. denied*, 120 S. Ct. 499 (1999). Justice Sullivan reasoned that stare decisis was his major concern and *AAFCO* had been the law in Indiana for some twenty-five years.

76. See *id.* at 489 (Dickson, J., dissenting).

77. See *id.* Chief Justice Shepard concurred in Justice Dickson's decision that Indiana should join the majority of states that allow private victims of libel to recover on a negligence theory. He also wrote a separate dissent in which he did not, however, address the constitutional issues. Justice Boehm concurred and summarily concluded that adopting an actual malice standard gives appropriate recognition to the balance necessary between the conflicting values found in sections 9 and 12. See *id.* at 469 (Boehm, J., concurring).

II. FEDERAL CONSTITUTIONAL LAW

A. Federalism

The most significant constitutional decisions of the Rehnquist Court this Term further expanded the doctrine of state sovereignty. In recent years, the U.S. Supreme Court has invoked the Tenth and Eleventh Amendments to greatly limit Congress' power both to enact laws aimed at states and to subject states to suit for violating federal laws. As to the Tenth Amendment, which reserves power not delegated to the federal government to the states, the Court two years ago in *Printz v. United States*,⁷⁸ invalidated the Brady Handgun Act because it impermissibly commanded the states' chief law enforcement officers to search records to ascertain whether a person could lawfully purchase a handgun.⁷⁹ The Court reasoned that the history and structure of the Constitution prohibit Congress from utilizing the Commerce Clause to compel state executive officers to enforce a federal regulatory program.⁸⁰ In a second significant ruling, *United States v. Lopez*,⁸¹ the Court ruled that Congress exceeded its power in passing a federal criminal statute prohibiting the possession of a firearm within 1000 feet of a school. The Court stated that Congress failed to make clear findings demonstrating that the regulated activity substantially affected interstate commerce, and Congress sought to regulate criminal activity that had nothing to do with commerce.⁸² In addition, the statute was not limited to firearms that had traveled in interstate commerce and it governed areas historically left to states, namely criminal law enforcement and education.⁸³

This Term federalism is revisited regarding three significant federal statutes. The Fourth Circuit in *Condon v. Reno*,⁸⁴ addressed the validity of the Driver's Privacy Protection Act (DPPA),⁸⁵ which regulates the dissemination and use of information contained in state motor vehicle records and prohibits state departments from disclosing personal information. The Fourth Circuit ruled that this was an unconstitutional exercise of commerce power that violated the Tenth Amendment because, as in *Printz*, it forced state employees to administer a federal regulatory program.⁸⁶ Chief Justice Rehnquist delivered the unanimous opinion of the Court reversing this holding. The Court ruled that the DPPA does not violate Tenth Amendment federalism principles because it does not "require

78. 521 U.S. 898 (1997).

79. *See id.* at 926.

80. *See id.* at 903-34.

81. 514 U.S. 549 (1995).

82. *See id.* at 561-63.

83. *See id.* at 562-64.

84. 155 F.3d 453 (4th Cir. 1998), *rev'd*, 120 S. Ct. 666 (2000).

85. 18 U.S.C. §§ 2721-2725 (1994 & Supp. III).

86. Note that the Seventh Circuit reached a contrary result, upholding the Act in *Wisconsin Department of Transportation v. Reno*, 163 F.3d 1000 (7th Cir. 1998), *cert. denied*, 120 S. Ct. 931 (2000).

the states in their sovereign capacity to regulate their own citizens [but rather] regulates the states as the owners of databases."⁸⁷ The Court distinguished⁸⁸ *Printz* and *New York v. United States*⁸⁹ as follows:

[T]he DPPA does not require the states in their sovereign capacity to regulate their own citizens It does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals.⁹⁰

Finding no Tenth Amendment violation, the Court also held that the Act has a valid exercise of congressional power under the Commerce Clause.⁹¹ The information that the DPPA regulates is a "'thing in interstate commerce,' and . . . the sale or release of that information in interstate commerce is therefore a proper subject of congressional regulation."⁹²

The Court this Term will also determine whether Congress exceeded its power in enacting the 1994 Violence Against Women Act that creates a right "to be free from crimes of violence motivated by gender."⁹³ In *Brzonkala v. Virginia Polytechnic Institute*,⁹⁴ the Fourth Circuit, relying on *Lopez*, ruled that this statute,⁹⁵ which creates a private cause of action against anyone who commits gender-motivated crimes, was an unconstitutional exercise of power despite congressional findings that gender motivated violence adversely affects interstate commerce.⁹⁶ Finally, in *United States v. Jones*⁹⁷ it will decide whether the federal arson statute⁹⁸ should be interpreted to apply to a private residence and, if so, whether this application is constitutional. The statute purportedly reaches

87. *Condon*, 120 S. Ct. at 672.

88. It likened the regulatory requirements of the DPPA to those upheld in *South Carolina v. Baker*, 485 U.S. 505 (1998) (statute that prohibited states from issuing unregistered bonds was constitutional because it regulated state activities and did not seek to control or influence the manner in which states regulate private parties).

89. 505 U.S. 144 (1992).

90. *Condon*, 120 S. Ct. at 672.

91. U.S. CONST. art. I, § 8, cl. 3.

92. *Condon*, 120 S. Ct. at 671 (quoting *United States v. Lopez*, 514 U.S. 549, 558-59 (1995)).

93. 42 U.S.C. § 13981 (1994).

94. 169 F.3d 820 (4th Cir.), *cert. granted sub nom.* *United States v. Morrison*, 120 S. Ct. 11 (1999). The Court's decision in *Morrison* will be discussed in next year's Survey Issue.

95. § 13981 (1994).

96. *See Brzonkala*, 169 F.3d at 845-59. Further, the Act could not be sustained as a constitutionally legitimate exercise of power under the Fourteenth Amendment because this Amendment does not permit Congress to make such a "sweeping intrusion" into areas of behavior traditionally regulated by the states. *Id.* at 867-89.

97. 178 F.3d 479 (7th Cir.), *cert. granted*, 120 S. Ct. 494 (1999), and *rev'd* by 120 S. Ct. 1904 (2000). The Court's reversal will be discussed in next year's Survey Issue.

98. 18 U.S.C. § 844(i).

only arson of property "used in interstate or foreign commerce or in any activity affecting" such commerce.⁹⁹ The Seventh Circuit sustained a broad reading of the law, reasoning that the collective effect of arsons on buildings or even residences establishes the requisite substantial effect on commerce.¹⁰⁰ Despite the unanimity of the decision in *Condon*, it is likely the Court, which has often split down the middle in the volatile federalism battle, will not reach common ground in these two cases because they address laws reaching non-commercial activity.

The Court let stand a Seventh Circuit decision upholding the constitutionality of an amendment to the Gun Control Act of 1968 against a Tenth Amendment challenge.¹⁰¹ An Indianapolis police officer sought to rely on the Tenth Amendment to invalidate a 1996 amendment to the Gun Control Act of 1968, which prohibits a person who has been convicted in any court of a misdemeanor claim of domestic violence from owning a firearm.¹⁰² The so-called Lautenberg Amendment applies to law enforcement officers, and it was invoked by the Indianapolis Police Department to terminate a police officer who pled guilty to a misdemeanor battery offense involving his ex-wife. In *Gillespie*, the Seventh Circuit ruled that this provision does not invade state sovereignty in violation of the Tenth Amendment.¹⁰³ The court held that the amendment was a proper exercise of Congress' power under the Commerce Clause because, unlike the statute in *Lopez*, the law contained an express requirement that the prosecution prove the firearm in question was shipped or transported in interstate commerce.¹⁰⁴ This "jurisdictional nexus" requirement distinguished the case from *Lopez*.¹⁰⁵ Further, the court ruled that it was not constitutionally significant that the firearms ban happened to include individuals employed in state and local law enforcement.¹⁰⁶ The law had only an ancillary effect on the employment of such officers and, unlike the law in *Printz*, it did not force states to administer and enforce a federal regulatory program.¹⁰⁷

The Supreme Court closed its 1998-99 Term with three major decisions interpreting the Eleventh Amendment that bars suit against states in federal court. These holdings dramatically curtail the power of Congress to provide a judicial forum for redress of state infringement of federal rights. One case, *Alden v. Maine*,¹⁰⁸ involved a suit brought by probation officers who claimed that the State of Maine violated the Fair Labor Standards Act (FLSA) by failing to observe

99. *Id.*

100. *See Jones*, 178 F.3d at 480-81.

101. *See Gillespie v. City of Indianapolis*, 185 F.3d 693 (7th Cir. 1999), *cert. denied*, 120 S. Ct. 934 (2000).

102. *See* 18 U.S.C. §§ 922(d)(9), 925(a)(1) (Supp. IV 1998).

103. *See Gillespie*, 185 F.3d at 697.

104. *See id.* at 706.

105. *Id.* at 698.

106. *See id.* at 707.

107. *See id.* at 708.

108. 119 S. Ct. 2240 (1999).

overtime provisions.¹⁰⁹ The employees first brought suit in federal district court, seeking compensation and liquidated damages. Because the Supreme Court in *Seminole Tribe of Florida v. Florida*,¹¹⁰ held that Congress does not have the power under Article I to abrogate the states' Eleventh Amendment immunity from damage suits in federal court, the case was dismissed. Because, however, the amendment only bars suit in federal court, the employees re-filed their action in state court.¹¹¹ The U.S. Supreme Court ruled that Congress lacks the power under Article I to subject non-consenting states to private suits in their own courts as well.¹¹² A five-Justice majority reasoned that state sovereign immunity is neither derived from nor limited by the terms of the Eleventh Amendment: "[T]he States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today"¹¹³

The Court justified its landmark decision by relying on the original intent of the framers of the Constitution as well as the common understanding of those who framed and ratified the document.¹¹⁴ Justice Kennedy in *Alden* admitted that the "historical record gives no instruction as to the founding generation's intent to preserve the States' immunity from suit in their own courts," but he interpreted congressional silence to mean that the framers never envisioned that Article I would strip states of their then-existing immunity from suit.¹¹⁵ The Court did not invalidate the Fair Labor Standards Act as applied to state employers, nor did it overturn its 1985 holding in *Garcia v. San Antonio Metropolitan Transit Authority*,¹¹⁶ which specifically rejected the state sovereignty argument. What the *Alden* Court did, however, was to deny a judicial forum in which private citizens can enforce their federal rights. The Court's decision in essence approved complete jurisdictional preclusion—a state employee who feels he is owed back wages or overtime under the FLSA has no forum in which to seek a remedy.

The Supreme Court tried to mitigate the apparent harshness of its holding by itemizing several arguments to support its contention that protecting sovereign immunity will not give states carte blanche power to disregard the Constitution or valid federal laws.¹¹⁷ First, the Department of Labor may still pursue FLSA claims on behalf of employees against a non-complying state in either state or federal court (provided it decides to invest resources to do this).¹¹⁸ Neither the Eleventh Amendment nor the broader state immunity doctrine, which it

109. See *id.* at 2246-47.

110. 517 U.S. 44 (1996).

111. See *Alden*, 119 S. Ct. at 2246.

112. See *id.*

113. *Id.* at 2246-47.

114. See *id.* at 2260.

115. *Id.*

116. 469 U.S. 528 (1985).

117. See *Alden*, 119 S. Ct. at 2269.

118. See *id.*

purportedly embodies, bars suits against states brought by the United States or federal agencies.¹¹⁹ Paradoxically, the Court's approach would mandate creation of a broad federal bureaucracy, contrary to concerns of federalism.

Second, the Court noted that sovereign immunity does not bar actions against state officers for injunctive or declaratory relief—the sovereign immunity concern focuses only on damages.¹²⁰ Third, the Court explained that states are free to enact, and some have indeed enacted statutes consenting to a wide variety of suits.¹²¹ Throughout the decision, the Court expressed its trust in state officials, proclaiming that a judicial forum is not necessary because we can trust that states will voluntarily comply with federal law. Obviously this comforting remark rings hollow in *Alden* where the state has in fact denied its employees a forum in which to vindicate violation of their federal right to overtime pay.

Fourth, the Court emphasized that its decision is based on the fact that Congress was exercising Article I powers, leaving intact the notion that when Congress acts under Section 5 of the Fourteenth Amendment, states may be forced to surrender a portion of their sovereignty preserved to them by the original Constitution.¹²² In *Fitzpatrick v. Bitzer*,¹²³ Justice Rehnquist, one of the most staunch advocates of the states' rights movement, confirmed that Congress may authorize private suits against non-consenting states in federal court pursuant to its Section 5 enforcement power since the Fourteenth Amendment itself fundamentally altered the balance of state-federal power.¹²⁴

Despite its recognition of Congress' broader power to restrict states' rights when it enacts legislation under Section 5 of the Fourteenth Amendment, the Court, in its two other federalism decisions last term, rejected congressional attempts to justify legislation under this provision. In the process, the Court further refined the limits of Congress' power under Section 5, first pronounced in *City of Boerne v. Flores*.¹²⁵ In that case, the Court struck the federal Religious Freedom Restoration Act (RFRA),¹²⁶ which subjected state laws to strict scrutiny whenever they interfere with religious liberty. The U.S. Supreme Court had interpreted the Free Exercise Clause to trigger only a rational basis analysis with regard to facially neutral, generally applicable statutes.¹²⁷ The Court reasoned

119. See *id.*

120. See *id.* at 2264.

121. See *id.* at 2267.

122. See *id.*

123. 427 U.S. 445, 456 (1976).

124. See *id.* at 446. The Court in *Alden* also acknowledged that Congress can employ the power of the purse, conditioning funding of state programs on the states' relinquishing their immunity. *Alden*, 119 S. Ct. at 2265. In addition, the Court noted that sovereign immunity bars suit against states but not lesser entities such as municipalities, counties, or other "non-arms" of the state. *Id.* at 2267.

125. 521 U.S. 507 (1997).

126. 42 U.S.C. §§ 2000bb-1 to 2000bb-4 (1994).

127. See *Employment Div. v. Smith*, 494 U.S. 872 (1990). RFRA was in direct response to this holding, which was viewed as significantly restricting protection for religious liberty.

that lawmakers exceeded their power by redefining, rather than merely providing, a remedy for the Fourteenth Amendment religious freedom guarantees.¹²⁸ In *City of Boerne*, the Court explained that to pass muster, a Section 5 measure must be remedial and there must be proportionality between the injury to be prevented or remedied and the means adopted to reach that end.¹²⁹

Last summer, the Court addressed the question of whether Congress, acting under Section 5 of the Fourteenth Amendment, could subject states to suit for violation of the Patent Act and the Lanham Act. In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,¹³⁰ College Savings Bank sued the state agency claiming it had pirated a plan for pre-paying college tuition that it had patented. The Court ruled that the lack of evidence of any widespread pattern of patent infringement by states precluded Congress from invoking its Fourteenth Amendment power to abrogate state immunity from patent infringement suits.¹³¹ In a 5-4 decision, Chief Justice Rehnquist reasoned that even though suits against states are expressly authorized by the Patent Remedy Act, Congress had no authority to enact the law.¹³² While acknowledging that patents qualify as "property" protected by the Fourteenth Amendment Due Process Clause, there was "scant support" for a finding that states have violated patent owners' constitutional rights by depriving them of their property without due process.¹³³ Further, with regard to RFRA, the remedy was "out of proportion to a supposed remedial or preventive object[ive]."¹³⁴ It made all states "immediately amenable to suit in federal court for all kinds of possible patent infringement and for an indefinite duration."¹³⁵

In a second case involving the same parties, *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,¹³⁶ the Court similarly rejected the Bank's right to proceed against the state under the Lanham Act. It held that Congress inappropriately sought to abrogate state immunity when it amended the Act to expressly allow suit against states for claims of false advertising.¹³⁷ The Court reasoned that because the protection against false advertising secured by the Act does not even implicate property rights protected by the Due Process Clause, Congress could not rely on its remedial power under Section 5 of the Fourteenth Amendment to abrogate state sovereign immunity.¹³⁸ In this case, the Court also held that states do not "constructively waive" their immunity by

128. See *id.* at 890.

129. See *City of Boerne*, 521 U.S. at 530.

130. 119 S. Ct. 2199 (1999).

131. See *id.* at 2207-08.

132. See *id.* at 2211.

133. *Id.* at 2210-11.

134. *Id.* at 2210 (quoting *City of Boerne*, 521 U.S. at 530).

135. *Id.*

136. 119 S. Ct. 2219 (1999).

137. See *id.* at 2223.

138. See *id.* at 2225.

voluntarily engaging in federally regulated conduct.¹³⁹ Thus, College Savings Bank had no remedy against the Florida state agency that allegedly copied the plaintiff's system for prepaying college tuition and also made misstatements in its brochures and annual reports touting its tuition prepayment plan, in violation of the Lanham Act as well as the Patent Act.¹⁴⁰

Four Justices in dissent in the first case recognized the potentially broader ramifications of these decisions: "The Court's opinion today threatens to read Congress' power to pass prophylactic legislation out of § 5 altogether."¹⁴¹ According to the dissent, the Constitution gave Congress plenary authority over patents and copyrights, and since Congress long ago preempted state jurisdiction over patent infringement, it was reasonable for Congress to assume that state remedies did not exist and that a federal forum was necessary.¹⁴² Unlike the broad statute challenged in *City of Boerne*, which subjected state conduct to strict scrutiny for any alleged interference with religious freedom, these laws narrowed in on a specific problem and "merely effectuated settled federal policy to confine patent infringement litigation to federal judges."¹⁴³ The Court's rulings suggest that in the future Congress cannot exercise its Section 5 power absent a well established record demonstrating a significant pattern of constitutional violations. More immediately, the cases mean that state officials and state entities, such as state universities, are absolutely immune from patent rights violations brought by private citizens seeking damages. Again, as in *Alden*, this would not preclude suits to enjoin a continuing violation of patent rights, i.e., prospective relief, nor suits brought by the U.S. government itself on behalf of private citizens who claim patent violations. Nonetheless, the decisions impose substantial obstacles to litigants who seek damages for violation of federal rights.

The extent to which the Court will closely scrutinize congressional legislation, even when such is enacted to protect Fourteenth Amendment rights, was reviewed this Term in *Kimel v. Florida Board of Regents*.¹⁴⁴ Professor Kimel brought suit under the Age Discrimination in Employment Act (ADEA) alleging that the state university discriminated against him and thirty-one other professors by adopting a salary structure that was biased against the aged in violation of federal law. The University contended that the ADEA was not a valid exercise of congressional power under Section 5 of the Fourteenth Amendment, and the Supreme Court agreed. In a 5 to 4 ruling, the Court determined that the substantive requirements that the Act imposed on state and local government were "disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act."¹⁴⁵ The Supreme Court has ruled in

139. *Id.* at 2229.

140. *See id.* at 2203 & n.1.

141. *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 119 S. Ct. 2199, 2217 (1999) (Stevens, J., dissenting).

142. *See College Savings Bank*, 119 S. Ct. at 2235 (Breyer, J., dissenting).

143. *Id.* at 2240.

144. 120 S. Ct. 631 (2000).

145. *Id.* at 645. The Act permits employers to rely on age only when it is a "bona fide

three decisions that states may discriminate on the basis of age provided the classification is rationally related to a legitimate interest.¹⁴⁶ Because the ADEA imposes a more stringent standard on state government, it could not be understood as merely responsive to or designed to prevent unconstitutional behavior.¹⁴⁷ Further, "Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of a constitutional violation."¹⁴⁸ This lack of evidence of discrimination, coupled with "the indiscriminate scope of the Act's provisions," led the Court to rule that the abrogation of the States' sovereign immunity was invalid.¹⁴⁹

The Court's analysis of the ADEA in *Kimel* promises to be critical because it calls into question the validity of other Acts of Congress that allow suit against state entities, including the Equal Pay Act¹⁵⁰ and the Americans with Disabilities Act.¹⁵¹ The Supreme Court has agreed to hear two cases this Term addressing the

occupational qualification reasonably necessary to the normal operation of the business." *Id.* at 647.

146. *See id.*

147. *See id.* at 647-48.

148. *Id.* at 649.

149. *Id.* at 650.

150. *See Varner v. Illinois State Univ.*, 150 F.3d 706 (7th Cir. 1998), *vacated*, *Illinois State Univ. v. Varner*, 120 S. Ct. 928 (2000) (remanded for consideration in light of *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631 (2000)). The Seventh Circuit held that Congress expressed clear intent to abrogate state immunity when it enacted the Equal Pay Act and this was a valid exercise of Congressional power under Section 5 of the Fourteenth Amendment, even if the legislative history did not clarify whether the Commerce Clause or Section 5 provided the constitutional basis for the law. *See Varner*, 150 F.3d at 712. The court reached the same conclusion with regard to the ADEA, reasoning that the legislature need not recite the constitutional basis for its enactment in order to effect a valid exercise of power. *See Goshtasby v. Board of Trustees*, 141 F.3d 761 (7th Cir. 1998); *accord Wichmann v. Board of Trustees of S. Ill. Univ.*, 180 F.3d 791 (7th Cir. 1999), *vacated*, *Board of Trustees of S. Ill. Univ. v. Wichmann*, 120 S. Ct. 929 (2000) (same remand as above).

151. In *Crawford v. Indiana Department of Corrections*, 115 F.3d 481 (7th Cir. 1997), the court held that the ADA was lawfully enacted under Section 5 and therefore abrogated any Eleventh Amendment defense to suit in a federal court. The Second Circuit reached a similar conclusion in *Muller v. Costello*, 187 F.3d 298 (2d Cir. 1999). The Seventh Circuit, however, has re-evaluated its decision in *Crawford* in light of the intervening *Kimel* decision. In *Erickson v. Board of Governors of State Colleges and Universities for Northeastern Illinois University*, 207 F.3d 945 (7th Cir. 2000), the court reasoned that in prohibiting disparate impact discrimination against the disabled and requiring accommodation of their disabilities, the ADA imposes remedies not required by the Fourteenth Amendment's equal protection clause which bars only intentional, irrational discrimination against the handicapped. Thus, the ADA exceeds Congress' enforcement power under Section 5 of the Fourteenth Amendment.

The court reasoned that Title 1 of the ADA actually goes further than the ADEA because it specifically requires state employers to consider and to accommodate disabilities unless doing so

constitutionality of the Americans with Disabilities Act, but both were dismissed when the parties settled.¹⁵² Subsequently, however, the Court granted certiorari in the case of *University of Alabama at Birmingham Board of Trustees v. Garrett*,¹⁵³ which will be decided during the 2000-01 term. The Eleventh Circuit ruled, contrary to the Seventh and Eighth Circuits, that states are not immune from suits brought by state employees under either the Americans with Disabilities Act or section 504 of the 1973 Rehabilitation Act.

B. Procedural and Substantive Due Process

As in past years, significant litigation involved the procedural Due Process Clause. The Supreme Court applies a two-prong analysis, requiring that a plaintiff initially identify a property or liberty interest. Assuming this burden is met, the Court then balances the competing interests to determine whether sufficient procedural safeguards have been afforded. As to the latter step, the Court balances: (a) the private interest affected; (b) the risk of erroneous deprivation and value of additional procedural safeguards; and (c) the government interest.¹⁵⁴

In *American Manufacturers Mutual Insurance Co. v. Sullivan*,¹⁵⁵ the U.S. Supreme Court held that disabled employees receiving workers' compensation benefits do not have a property interest protected by the Due Process Clause in payment of benefits for treatment that has not yet been found to be "reasonable and necessary."¹⁵⁶ Plaintiffs challenged a Pennsylvania statute that gave employers and insurers the right to withhold payment of medical bills during an impartial review of treatment options by an independent panel. The Court initially found that the Due Process Clause does not apply at all to the conduct of private insurers—the state's heavy regulation of insurance companies did not convert private conduct into state action.¹⁵⁷ Although this alone would have justified rejection of plaintiffs' case, the Court went on to hold that no property

would impose an undue hardship. The court emphasized, however, that "all our holding means is that private litigation to enforce the ADA may not proceed in federal court." *Id.* at 952. Because Illinois has not adopted a "blanket rule of sovereign immunity," but actually has authorized suits against itself under state disability discrimination law, it would not be immune from suit in its own state courts. *Id.* By attaching this significant caveat to its holding, the court leaves open ADA suits against state employers in Illinois, provided such suits are pursued in Illinois state court.

152. See *Alsbrook v. City of Maumelle*, 184 F.3d 999 (8th Cir. 1999), *cert. granted*, *Alsbrook v. Arkansas*, 120 St. Ct. 1003, and *cert. dismissed*, 120 S. Ct. 1265 (2000); *Florida Dep't of Corrections v. Dickson*, 139 F.3d 1426 (11th Cir. 1998), *cert. granted*, 525 U.S. 1121 (1999), and *cert. dismissed*, 120 S. Ct. 1236 (2000).

153. 193 F.3d 1214 (11th Cir.), *cert. granted*, 120 S. Ct. 1669 (2000).

154. See *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

155. 119 S. Ct. 977 (1999).

156. *Id.* at 990.

157. See *id.* at 980-81.

right was implicated.¹⁵⁸ This is because under Pennsylvania law, payment of a medical bill to a workers' compensation recipient was not owed unless medical treatments were deemed "reasonable and necessary."¹⁵⁹ Until that determination is made, injured workers simply had no property interest in having their providers pay for treatment.¹⁶⁰

In *Crenshaw v. Baynerd*,¹⁶¹ the court rejected claims brought by an attorney against members of the Indiana Civil Rights Commission for failing to investigate a charge she brought against a judge who had sanctioned her for filing frivolous claims. She alleged that the defendants violated her right to due process because they dismissed her complaint without complying with what she perceived to be an Indiana statutory mandate to investigate all charges filed with the Commission.¹⁶² The court ruled that the plaintiff failed to identify a property interest or a state-created liberty interest sufficient to raise any procedural due process claim.¹⁶³ On the other hand, in *St. John v. Town of Ellettsville*,¹⁶⁴ a district court held that a personnel policy adopted by a town council as an ordinance may create a federally protected property interest in a job even if, under Indiana law, it would not be deemed a contract altering at-will employment status.¹⁶⁵ The court reasoned that if an ordinance evidenced a mutually explicit understanding of continued employment, it may establish a federally protected property interest.¹⁶⁶ Thus, the defendants were not entitled to summary judgment on the procedural due process issue.¹⁶⁷

Even if a property or liberty interest is identified, the balance of factors may dictate that the procedural safeguards were adequate. For example, in *City of West Covina v. Perkins*,¹⁶⁸ the U.S. Supreme Court unanimously held that when police officers seize property pursuant to a warrant for a criminal investigation, procedural due process does not require them to give the owner of the property notice of state statutory remedies available for recovering the property.¹⁶⁹

158. See *id.* at 990.

159. *Id.*

160. See *id.*

161. 180 F.3d 866 (7th Cir.), *cert denied*, 120 S. Ct. 374 (1999).

162. See *id.* at 867.

163. See *id.* at 869; see also *Reed v. Schultz*, 715 N.E.2d 896, 901-02 (Ind. Ct. App. 1999) (finding that an educator's interest in remaining on a list of available special education hearing officers for a two-year period, even if based on an implied contract protected under state law, does not rise to the level of a constitutionally protected property interest; mere placement on the list does not trigger compensation nor guarantee educator will be assigned any hearings since such is left strictly to the discretion of the Superintendent, and thus is "too attenuated from receipt of the actual benefit, case assignment, to constitute a protected property interest").

164. 46 F. Supp.2d 834 (S.D. Ind. 1999).

165. See *id.* at 844.

166. See *id.*

167. See *id.* at 847-48.

168. 119 S. Ct. 678 (1999).

169. See *id.* at 681.

Although due process requires police to notify the owner that the property has been taken, it does not require the police to provide individualized notice of state-law remedies because the owner can readily turn to "public sources" to learn about such remedies.¹⁷⁰ The Court distinguished its earlier ruling in *Memphis Light, Gas & Water Division v. Craft*,¹⁷¹ holding that notice of available remedies to contest termination of utility service was mandated by the Due Process Clause. That case was distinguishable because the available administrative remedy was not described in any publicly available document.¹⁷²

The U.S. Supreme Court has recognized that the Due Process Clause also contains a substantive component that bars arbitrary, wrongful conduct. Where the government interferes with a fundamental right, the Court has demanded that the conduct meet a strict scrutiny standard. The U.S. Supreme Court has ruled, for example, that parents have a fundamental right to guide the upbringing of their children.¹⁷³ This term, in *Troxel v. Granville*,¹⁷⁴ the Court will determine whether this right trumps the interests of grandparents who seek visitation. Several states, including Indiana, in recent years have enacted Grandparent Visitation Statutes. The Washington Supreme Court ruled that its statute, which permits any person to petition for child visitation rights whenever this serves the best interests of the child, interferes with the parents' fundamental liberty interest in the care and companionship of their children.¹⁷⁵

Where no fundamental right is identified, the U.S. Supreme Court generally has been very reluctant to find a substantive due process violation, and it has required the plaintiff to demonstrate that the government acted in a truly "conscience-shocking" fashion before it will intervene. In *Conn v. Gabbert*,¹⁷⁶ the Court conceded that individuals enjoy a general substantive due process right (though not a fundamental right) to practice a trade or profession.¹⁷⁷ However, it rejected an attorney's claim that a prosecutor's execution of a search warrant against him while his client, a grand jury witness, was testifying violated this right. The Court reasoned that earlier cases involved "a complete prohibition of the right to engage in a calling, and not the sort of brief interruption which

170. See *id.* at 682.

171. 436 U.S. 1 (1978).

172. See *West Covina*, 119 S. Ct. at 682.

173. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

174. 120 S. Ct. 11 (1999) (decision below was *In re Custody of Smith*, 969 P.2d 21 (Wash. 1998)). The Court's finding that Washington's statute was unconstitutional will be analyzed in next year's Survey Issue.

175. See *In re Custody of Smith*, 969 P.2d at 24. Compare *Sightes v. Barker*, 684 N.E.2d 224 (Ind. Ct. App. 1997) (Indiana's Grandparent Visitation Act does not unconstitutionally burden parent's right to raise their children; even under strict scrutiny, state has a compelling interest in protecting the welfare of a child, and because visitation would be granted only if the court determined this was in the child's best interest, the Act was no more intrusive than necessary).

176. 119 S. Ct. 1292 (1999).

177. See *id.* at 1294.

occurred here.”¹⁷⁸ In short, “the Fourteenth Amendment right to practice one’s calling is not violated by the execution of a search warrant, whether calculated to annoy or even to prevent consultation with a grand jury witness.”¹⁷⁹ The Court also ruled that the attorney did not have standing to raise a claimed violation of his client’s right to advice concerning exercise of the privilege against self-incrimination.¹⁸⁰

Another U.S. Supreme Court case brought under the Due Process Clause, *City of Chicago v. Morales*,¹⁸¹ addressed the question of whether Chicago’s loitering ordinance was unconstitutionally vague. The ordinance defined loitering as remaining “in any one place with no apparent purpose,”¹⁸² and it authorized police to issue dispersal orders to a group of two or more persons seen loitering in a public place if the officer reasonably believed one of them was a criminal street gang member.¹⁸³ The ordinance made it a criminal offense to disobey such an order, and the Illinois Supreme Court construed its law to give “absolute discretion to police officers to determine what activities constitute loitering.”¹⁸⁴ This interpretation proved fatal to the ordinance’s constitutionality. The Court reasoned that the ordinance lacked sufficient guidelines to prevent arbitrary or discriminatory enforcement and provided too much discretion to local police.¹⁸⁵ Further, the “no apparent purpose” language was inherently subjective because it depended on whether some purpose was apparent to the officer on the scene.¹⁸⁶ The Court did suggest that a loitering ordinance limited to those acting with an apparently harmful purpose or aimed only at suspected gang members might pass constitutional muster, but here the ordinance covered even “harmless loitering” and allowed for the arrest of non-gang members.¹⁸⁷

The Court’s refusal to tolerate vague anti-loitering laws was not surprising in light of *Papachristou v. City of Jacksonville*,¹⁸⁸ where the Court twenty-seven years ago unanimously ruled a similar ordinance unconstitutional. This time the U.S. Supreme Court was much more divided on the issue, perhaps because the findings accompanying the ordinance pointed to rising street gang activity in Chicago and increased rates of murder and other serious crimes. The City Council contended that gangs used loitering to establish control over turf, and that such loitering induced fear among persons. During the three years the statute was in place, it generated 42,000 arrests and the city’s homicide rate dropped

178. *Id.* at 1296.

179. *Id.*

180. *See id.*

181. 119 S. Ct. 1849 (1999).

182. *Id.* at 1851.

183. *See id.*

184. *Id.* at 1861.

185. *See id.*

186. *Id.* at 1862.

187. *Id.*

188. 405 U.S. 156 (1972).

some twenty-five percent.¹⁸⁹

The dissenting Justices in *Morales* chided their colleagues for creating a "fundamental right to loiter" and for failing to recognize the seriousness of the problem faced by the city.¹⁹⁰ Justice Scalia stated in his dissent that:

The citizens of Chicago have decided that depriving themselves of the freedom to 'hang out' with a gang member is necessary to eliminate pervasive gang crime and intimidation—and that the elimination of the one is worth the deprivation of the other. This Court has no business second-guessing either the degree of necessity or the fairness of the trade.¹⁹¹

Justice Thomas similarly stressed the harm caused by gangs and complained that the majority ignored the plight of those who have seen their neighborhoods "literally destroyed by gangs and violence and drugs."¹⁹²

Although the six Justices in the majority recognized these concerns, they relied on *Papachristou* as well as a 1965 case, *Shuttlesworth v. City of Birmingham*,¹⁹³ in which the Court overturned a city's anti-loitering law which was used primarily against black picketers. In this case, Luis Gutierrez similarly claimed that he was targeted partly because of his Hispanic appearance. The complaint alleged that black and Hispanic young men were being given criminal records unfairly because of this ordinance.¹⁹⁴ Although a majority voted to invalidate the law, Justices both in the majority and in concurring opinions stressed that with some modification, gang loitering statutes in fact could be sustained.¹⁹⁵

C. Free Speech and Association Rights

1. *Commercial Speech*.—Since 1976, the U.S. Supreme Court has recognized that commercial speech falls within the umbrella of the First Amendment, although it has never afforded commercial speech the full protection of non-commercial speech. Because commercial speech is protected only to the extent it conveys truthful information to consumers, the state may ban such speech if it is false, deceptive, misleading, or if it concerns unlawful activity. Further, in *Central Hudson Gas & Electric Corp. v. Public Service Commission*,¹⁹⁶ the Court held that even truthful, non-misleading commercial

189. See *Morales*, 119 S. Ct. at 1855 n.7; see also David G. Savage, *Civil Liberties Back on the Street: Anti-Gang Efforts Struck Down; Ruling Criticized as Creating a "Right to Loiter,"* 85 A.B.A. J. 50 (1999).

190. *Morales*, 119 S. Ct. at 1878-83 (Thomas, J., dissenting).

191. *Id.* at 1879 (Scalia, J., dissenting).

192. *Id.* at 1887 (Thomas, J., dissenting).

193. 382 U.S. 87 (1965).

194. See Savage, *supra* note 189, at 50.

195. See *Morales*, 119 S. Ct. at 1860, 1864.

196. 447 U.S. 557 (1980).

speech may be subject to state regulation, provided the law directly and materially advances a substantial governmental interest in a manner no more extensive than necessary to serve that interest.¹⁹⁷

Applying the factors in *Central Hudson*, the Court in *Greater New Orleans Broadcasting Ass'n v. United States*,¹⁹⁸ unanimously struck down part of a federal statute¹⁹⁹ and FCC regulations prohibiting radio and television broadcasters from carrying advertising about privately operated commercial casino gambling. A few years ago in *United States v. Edge Broadcasting Co.*,²⁰⁰ the Court upheld the constitutionality of a portion of this statute that prohibits broadcast of lottery advertisements from stations licensed in non-lottery states. Congress could proscribe the advertisement of Virginia's lottery by a broadcaster in North Carolina where the lottery was restricted because the ban advanced the government's policy of assisting states that ban or limit gambling within their borders.²⁰¹ The *Greater New Orleans Broadcasting Ass'n* case was different in that New Orleans broadcasters wanted to run advertisements for commercial casinos that are lawful in Louisiana and Mississippi.²⁰² In a sense, this was an easy case because the federal government presented little, if any, justification for its statute. Although the government asserted that its law was aimed at preventing the social costs of gambling, it was riddled with exceptions that favored state lotteries as well as casinos operated by Native American Indians and not-for-profit organizations.²⁰³ When the ban was added to the Federal Communications Act of 1934, gambling was illegal nationwide and commercial speech was afforded no protection under the First Amendment. Today, lotteries are sponsored by thirty-seven states and Native American Indians operate casinos in about half the states.²⁰⁴ The fact that Congress has done little to directly and effectively halt this expansion or to otherwise address "the social costs" of gambling undermined its asserted interest.²⁰⁵

Thus, the Court ruled that the law violated the *Central Hudson* test. It did not directly advance the asserted government interests, and it was more extensive than necessary. The regulatory scheme was "so pierced by exemptions and inconsistencies" that it could not be said to advance the state's interest in alleviating casino gambling's social costs.²⁰⁶ Further, even if it directly advanced the federal government's interest in assisting states that disfavored private casinos, the law "sacrifices an intolerable amount of truthful speech about lawful

197. See *id.* at 566.

198. 119 S. Ct. 1923 (1999).

199. 18 U.S.C. § 1304 (1994).

200. 509 U.S. 418 (1993).

201. See *id.* at 428.

202. See *Greater New Orleans*, 119 S. Ct. at 1928.

203. See *id.* at 1925.

204. See *id.* at 1931 n.5.

205. *Id.* at 1926.

206. *Id.* at 1933.

conduct.”²⁰⁷ The Court left intact the decision in *Edge Broadcasting* that the federal government may proscribe the broadcast of lottery advertisements from stations licensed in non-lottery states. The problem in this case was that the government imposed speech restrictions selectively “among speakers conveying virtually identical messages.”²⁰⁸ Justice Thomas concurred separately to reiterate his view that *Central Hudson* should not be applied at all when the Government’s interest is simply to keep legal users of a product ignorant in order to manipulate choices in the market place.²⁰⁹ The majority found “no need to break new ground” in this case, although it recognized the Court’s growing disillusionment with *Central Hudson*.²¹⁰

2. *Anonymity*.—It has long been recognized that anonymity is an important part of First Amendment doctrine. Recognizing that the Federalist Papers themselves were written anonymously, the U.S. Supreme Court has been wary of measures that mandate disclosure, in particular by those who engage in controversial speech. This term, the Court invoked this principle to invalidate a California statute mandating that those who gather signatures to qualify ballot initiative measures cannot be forced to wear identification badges. In *Buckley v. American Constitutional Law Foundation, Inc.*,²¹¹ three ballot-initiative proponents testified that the badge law kept potential workers from circulating petitions. Recognizing that petition circulation is “core political speech” for which First Amendment protection is “at its zenith,” the Court applied “exacting scrutiny” in weighing the injury to speech against the State’s proffered interest of “enabl[ing] the public to identify, and the State to apprehend, petition circulators who engage in misconduct.”²¹² The Court concluded that the badge requirement “discourage[d] participation in the petition circulation process by forcing name identification without sufficient cause.”²¹³

The same principle of anonymity was invoked by the Ku Klux Klan in Indiana to challenge a Goshen ordinance forbidding Klan members from wearing masks in public. In *American Knights of the Ku Klux Klan v. City of Goshen*,²¹⁴ the district court held that the Constitution protects a speaker’s right to anonymity when past harassment makes it likely that disclosure will impact a “group’s ability to pursue its collective efforts at advocacy.”²¹⁵ The statute made it unlawful for a person to wear a mask or other device in a public place for the purpose of disguising or concealing his or her identity, and subjected those who violated the ordinance to a fine of up to \$2500.²¹⁶ The Mayor of Goshen asserted

207. *Id.* at 1935.

208. *Id.*

209. *See id.* at 1936 (Thomas, J., concurring).

210. *Id.* at 1930.

211. 119 S. Ct. 636 (1999).

212. *Id.* at 645-46.

213. *Id.* at 646.

214. 50 F. Supp.2d 835 (N.D. Ind. 1999).

215. *Id.* at 836.

216. *See id.*

that the law was passed based on citizens' complaints that the Klan's appearance in the city had caused intimidation and fear because citizens did not know the masked people's identity.²¹⁷

The court rejected these arguments. It relied on *Buckley*, as well as the U.S. Supreme Court's earlier decision in *McIntyre v. Ohio Elections Commission*,²¹⁸ which struck down an ordinance prohibiting the anonymous distribution of political leaflets.²¹⁹ Because the Klan presented cogent evidence that its members were retaliated against as a result of disclosure of their identity, strict scrutiny had to be applied, and the City could not prove that its anti-mask ordinance was narrowly tailored to serve an overriding or compelling state interest.²²⁰ While conceding that the prevention of violence and the identification and apprehension of criminals are compelling government interests, the record did not support a connection between the ordinance and Goshen's asserted interest.²²¹ City officials could not show how the ban on masks would help to prevent violence, nor was there any evidence that Klan members engaged in criminal activity while masked.²²²

3. *Free Speech and Association Rights of Government Employees.*—The U.S. Supreme Court has held that the government cannot condition employment upon relinquishing First Amendment rights.²²³ However, the Court has also recognized that speech rights of government employees are not the same as those of the public at-large. Rather, courts must balance "the interests of [the employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs"²²⁴ As the U.S. Supreme Court explained in *Waters v. Churchill*,²²⁵ when an employee "begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her."²²⁶ In *Klunk v. County of St. Joseph*,²²⁷ the Seventh Circuit applied this analysis to reject free speech claims brought by the Director of Intake at the County Juvenile Probation Department. Klunk was terminated after he announced his intention to run for the school board.²²⁸ Applying the *Pickering* balancing test, the circuit court determined that the Juvenile Probation Department's interest in having confidential employees and providing efficient services without the appearance of political considerations outweighed Klunk's

217. See *id.* at 837.

218. 514 U.S. 334 (1995).

219. See *id.* at 357.

220. See *American Knights of the Klu Klux Klan*, 50 F. Supp.2d at 842.

221. See *id.*

222. See *id.* at 843.

223. See *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967).

224. *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968).

225. 511 U.S. 661, 675 (1994).

226. *Id.* at 675.

227. 170 F.3d 772 (7th Cir. 1999).

228. See *id.* at 774.

interest in serving on the school board or in being a candidate for that body.²²⁹ The Seventh Circuit has set forth several factors to consider when performing the *Pickering* balancing test, including:

(1) whether the statement would create problems in maintaining discipline by immediate supervisors or harmony among co-workers; (2) whether the employment relationship is one in which personal loyalty and confidence are necessary; (3) whether the speech impeded the employee's ability to perform his daily responsibilities; (4) the time, place, and manner of the speech; (5) the context in which the underlying dispute arose; (6) whether the matter was one on which debate was vital to informed decisionmaking; and (7) whether the speaker should be regarded as a member of the general public.²³⁰

Applying these factors, the court concluded that probation officers hold a position of loyalty and confidence, and Klunk's political role might affect his exercise of discretion or at least create the impression in the public eye that it could do so.²³¹

The Seventh Circuit similarly struck the *Pickering* balance in favor of defendants in the case of *Weicherding v. Riegel*.²³² In this case, the Illinois Department of Corrections suspended a guard, who held an intermediate management position at the prison, after he spoke to the television media in order to promote a Ku Klux Klan rally. The court reasoned that if the inmate population and staff perceived that prison administrators tolerated a Klan supporter, this would exacerbate racial tensions within the prison and increase danger to the staff as well as inmates.²³³ The Seventh Circuit determined that the State's interest in maintaining safety and avoiding racial violence at the prison clearly outweighed the employee's interest in associating with and promoting the Klan.²³⁴ Although there were no racially motivated violent attacks or disruptions in the few days between the time the local broadcasts were aired and the employee's suspension, the court cited U.S. Supreme Court precedent clarifying that government need not wait for actual disruption to occur in the workplace before sanctioning speech.²³⁵ Instead, courts have "given substantial weight to government employers' reasonable predictions of disruption"²³⁶

Despite this deferential approach, the *Pickering* balance was struck in favor

229. See *id.* at 776.

230. *Id.*

231. See *id.* at 778. Klunk also claimed the defendants violated his rights under the Indiana Constitution, article I, section 9. The court ruled that the analysis under section 9 was the same as that under the First Amendment. See *id.*

232. 160 F.3d 1139 (7th Cir. 1998).

233. See *id.* at 1143.

234. See *id.*

235. See *id.* at 1143-44.

236. *Id.* (citing *Waters v. Churchill*, 511 U.S. 661, 673 (1994)).

of the employee in another Seventh Circuit case, *Coady v. Steil*.²³⁷ The plaintiff was a firefighter who was struck in the face numerous times by his superior for displaying a sign on his car roof in support of the democratic candidate for mayor.²³⁸ Demonstrating the confusion in this area, the court first announced that the *Connick-Pickering* analysis requires the plaintiff to show that his interest in exercising his rights outweighs the government's interest "in promoting the efficiency of its public services."²³⁹ Later, the court more accurately stated that the "burden of showing that the government's interests outweighed the plaintiff's falls on the defendant."²⁴⁰ Setting forth the seven factors cited *supra*, the court emphasized that the plaintiff was not on duty at the time he exercised his First Amendment rights and that the defendant offered no evidence that the plaintiff's conduct "in any way poisoned the atmosphere" of the fire department.²⁴¹ In addition, none of the other firefighters suggested that the political sign "threatened to undermine the sense of harmony at the Firehouse."²⁴² The court concluded by stating that:

[T]he defendant has failed to carry his burden of showing that the plaintiff's right to exercise his First Amendment rights by affixing a placard atop his car in support of a candidate for mayor while he was off-duty was outweighed by the government's interest in the effective and efficient delivery of firefighting services.²⁴³

As this statement suggests, the burden of proof ultimately is on the government to justify the retaliatory action once the plaintiff proves his speech is a matter of public concern.

In *Warner v. City of Terre Haute*,²⁴⁴ the district court used a different rationale to reject First Amendment claims brought by an employee alleging she was retaliated against because she had supported the mayor's opponent in the primary. Although the court acknowledged that the right to associate with others for the advancement of common political beliefs and ideas is protected by the U.S. Constitution, it concluded that none of the alleged retaliatory acts rose to the level of a constitutional rights violation.²⁴⁵ Warner claimed that as a result of her support for the mayor's opponent she was subjected to numerous acts of harassment. She was reassigned from the information desk to the records room to perform mundane clerical tasks.²⁴⁶ She was transferred from a daytime to night shift, and she was not allowed to leave the building for a dinner break

237. 187 F.3d 727 (7th Cir. 1999).

238. *See id.* at 729.

239. *Id.* at 731.

240. *Id.* at 732.

241. *Id.*

242. *Id.*

243. *Id.* at 733.

244. 30 F. Supp.2d 1107 (S.D. Ind. 1998).

245. *See id.* at 1124.

246. *See id.* at 1113.

during the night shift. When she returned to the information desk, she was subjected to close surveillance by a supervisor,²⁴⁷ her lunch break was reduced from one hour to forty minutes, and she was required to ask a male supervisor for permission to go to the bathroom.²⁴⁸ Finally, her request to transfer her PERF pension to the police pension fund was delayed.²⁴⁹ Nonetheless, the court rejected plaintiff's claim because she was not disciplined, threatened with discipline, reprimanded, or demoted, nor did she lose any pay.²⁵⁰ Despite the litany of harassment, the court concluded that none of this would deter the ordinary person from holding political beliefs.²⁵¹ The court's crabbed reading of the First Amendment ignores the chilling effect retaliatory action has on government employees. It also sends a misconceived message to employers that they may harass with impunity provided the retaliatory action does not deny economically tangible job benefits. Although retaliatory conduct must be significant enough such that it would deter a person from exercising her First Amendment rights, cases in the Seventh Circuit suggest that low performance evaluations and job transfers that dramatically alter tasks, even though not accompanied by salary reduction, may trigger First Amendment protection.²⁵²

D. Freedom of Religion

1. Aid to Parochial Education.—One of the most controversial and recurring constitutional issues facing the U.S. Supreme Court is whether parochial education may be funded by government vouchers issued to parents to pay tuition at the school of their choice. The Court in 1998 denied certiorari in the case of *Jackson v. Benson*,²⁵³ leaving intact the Wisconsin Supreme Court ruling that such voucher systems are constitutional, at least where eligibility criteria are religion neutral. On the other hand, courts in Vermont, Maine, Ohio, and Puerto Rico have invalidated voucher programs.²⁵⁴

247. See *id.* at 1114.

248. See *id.*

249. See *id.* at 1126.

250. See *id.* at 1121.

251. See *id.* at 1128.

252. See *Hulbert v. Wilhelm*, 120 F.3d 648, 654-55 (7th Cir. 1997) (lower performance evaluation and lower cost of living salary increase constitute adverse job actions); see also *Dahm v. Flynn*, 60 F.3d 253, 256-57 (7th Cir. 1994) (dramatic downward shift in skill level required to perform job duties can constitute adverse employment action and thus precludes summary judgment); *Glass v. Dachel*, 2 F.3d 733, 742 (7th Cir. 1993) (letter of reprimand may be viewed as retaliatory action).

253. 578 N.W.2d 602 (Wis.), *cert. denied*, 119 S. Ct. 466 (1998). See also *Kotterman v. Killian*, 972 P.2d 606, 626 (Ariz.) (upholding the use of tax credit to support private and sectarian schools), *cert. denied*, 120 S. Ct. 283, *cert. denied*, 120 S. Ct. 42 (1999).

254. See *Bagley v. Raymond Sch. Dep't*, 728 A.2d 127 (Me.), *cert. denied*, 120 S. Ct. 364 (1999); *Chittenden Town Sch. Dist. v. Department of Educ.*, 738 A.2d 539 (Vt.), *cert. denied*, 120 S. Ct. 626 (1999); *Assoc. de Maestros de Puerto Rico v. Torres*, 1994 WL 780744 (P.R. Nov. 30,

The increase in voucher statutes has been fueled in part by the U.S. Supreme Court's 1997 decision in *Agostini v. Felton*,²⁵⁵ which overturned earlier restrictive decisions and held that it was permissible for the federal government to fund remedial instruction and counseling for disadvantaged students in parochial schools.²⁵⁶ In a narrow 5-4 ruling, the majority reasoned that sending publicly-paid teachers into religious schools to help students with such subjects as math, science, and English, does not violate the constitutionally required separation between church and state.²⁵⁷ The Court emphasized that providing remedial education pursuant to Title I of the 1965 Elementary and Secondary Education Act²⁵⁸ would not supplant the cost of regular education nor would it create a financial incentive to undertake religious education, thus perhaps distinguishing the voucher situation.²⁵⁹ In addition, no actual dollars flowed into the coffers of the religious schools, whereas voucher checks are signed over to parochial schools by parents without any restrictions as to how the funds will be expended.²⁶⁰ The mere size of the financial aid could swing one vote to invalidate such programs, at least if offered on a large scale. On the other hand, the Court in *Agostini* more broadly asserted that aid to parochial schools would not be deemed to impermissibly advance religion if "it does not result in governmental indoctrination, define its recipients by reference to religion, or create an excessive entanglement."²⁶¹

Although the U.S. Supreme Court has thus far denied certiorari in the voucher and tax credit cases, it may very likely clarify its position on "parochial-aid" this term. It has agreed to review the constitutionality of Title I (the same statute at issue in *Agostini*) as applied to the loan of state-owned instructional equipment, including computers and software, to religious schools. In *Helms v. Picard*,²⁶² the Fifth Circuit ruled that the assistance violated the Establishment Clause because the equipment could readily be used to advance the sectarian

1994) (unreported). In an Ohio case the U.S. Supreme Court has granted an application to stay a federal district court order, which preliminarily enjoined implementation of a state's tuition voucher program, whereby scholarship payments could be made by the state to private schools providing education to certain students from kindergarten through eighth grade. The district court ruled that because the overwhelming number of private schools participating in the program were sectarian, financial assistance would not satisfy the Establishment Clause requirement that government action cannot advance religion. See *Simmons-Harris v. Zelman*, 54 F. Supp.2d 725 (N.D. Ohio), *stay granted*, 120 S. Ct. 443 (1999) (Justices Stevens, Souter, Ginsburg and Breyer would deny the application for stay).

255. 521 U.S. 203 (1997).

256. See *id.* at 240.

257. See *id.* at 226-28.

258. 20 U.S.C. §§ 6301-8962 (1994 & Supp. III 1997).

259. See *Agostini*, 521 U.S. at 229.

260. See *id.* at 2013.

261. *Id.* at 234.

262. 151 F.3d 347 (5th Cir. 1998), *cert. granted sub nom.*, *Mitchell v. Helms*, 119 S. Ct. 2336 (1999).

mission of the schools. In recent years, several Justices have vociferously argued that the current test for ascertaining whether the wall between church and state has been breached is too restrictive and should be replaced by a more "accommodationist" approach.²⁶³ The current standard mandates that any government program have a secular purpose and its primary effect cannot advance religion. In addition, the program cannot create excessive entanglement between church and state.²⁶⁴ Using this "test," the U.S. Supreme Court in the 1970s invalidated most forms of direct assistance to parochial schools, other than textbooks.²⁶⁵ Although never formally overturned, the Court's recent decisions appear to ignore this analysis. Justice O'Connor has tried to persuade her colleagues that the Establishment Clause is violated only where the government has endorsed or demonstrated approval of religion.²⁶⁶ Justices Rehnquist, Scalia and Thomas contend that a violation occurs only when government discriminates among religious organizations or imposes coercive pressure to engage in religious activities.²⁶⁷ Justices Ginsburg, Breyer, Souter and Stevens would apparently maintain the stricter separationist approach.²⁶⁸ Thus far, no majority position has emerged.

*Mitchell v. Helms*²⁶⁹ provides the Court an opportunity to further explicate its Establishment Clause jurisprudence, and this ruling could be critical to the voucher debate. If a majority adopts an endorsement test, it can be argued that facially neutral voucher programs do not send a message that government is endorsing religion. Rather, such programs simply promote parental choice regarding the education of their children. If a majority adopts a coercion approach, it is highly likely that no coercion will be found, although some have argued that because of the small number of private non-sectarian schools, parents living in drug and gang infested public school districts may feel coerced into "choosing" a parochial education for their children. In any event, the Court appears ready to drop its earlier analysis and its choice of a new "test" will be extremely important to the broader parochial aid debate.

2. *Official Acknowledgment of Religion.*—The Supreme Court let stand two circuit decisions holding as constitutional a state's designation of Good Friday as a paid legal holiday. The key Seventh Circuit decision this past year

263. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 399-400 (1993) (Scalia, J., concurring).

264. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971).

265. *See Meek v. Pittenger*, 421 U.S. 349 (1975).

266. *See Wallace v. Jaffree*, 472 U.S. 38, 75 (1985) (O'Connor, J., concurring); *see also Books v. City of Elkhart*, 79 F. Supp. 979 (N.D. Ind. 1999) (the Lemon Test is not helpful in cases involving government display of religious symbols unless applied in the form of the endorsement test, and under that analysis a city may acknowledge the importance of the Ten Commandments in the moral and legal development of the nation by displaying it on a monument outside the City Municipal Building).

267. *See Lee v. Weisman*, 505 U.S. 577, 637-44 (1992) (Scalia, J., dissenting).

268. *See Agostini v. Felton*, 521 U.S. 203, 240-60 (1997).

269. 119 S. Ct. 2336 (1999).

addressing the Establishment Clause was *Bridenbaugh v. O'Bannon*,²⁷⁰ wherein plaintiff challenged the constitutionality of a statute that has made Good Friday a paid legal holiday in Indiana since 1941.²⁷¹ The Seventh Circuit initially acknowledged that *Agostini* did not alter the Supreme Court's traditional three-part establishment clause analysis, which, as discussed, focuses on whether the governmental action has a secular purpose, whether its principal or primary effect advances religion, and whether it fosters an excessive entanglement with religion.²⁷² Indiana justified its Good Friday law as accomplishing the secular purpose of providing a "spring holiday."²⁷³ Although there is no legislative history explaining the original reason for the Good Friday holiday, the court accepted the State's argument that it continues to recognize it in order to provide a vacation day during the four month period between Martin Luther King, Jr.'s birthday, observed in January, and Memorial Day, observed in May.²⁷⁴ More generally, the State presented evidence that it believes generous holidays help to bolster employee efficiency and morale.²⁷⁵ In addition, because many schools and many employers are closed for Good Friday, this provides a logical day to accommodate those state employees whose children are out of school and/or spouses who are off work.²⁷⁶

Although four years ago the Seventh Circuit invalidated an Illinois statute making Good Friday a legal holiday in the Illinois public school system,²⁷⁷ the court distinguished that case based on the different secular interest advanced.²⁷⁸ Illinois had argued the holiday was justified to save the school the expense of staying open when few teachers and students would be in attendance, but the state failed to present any evidence as to the number of students and teachers who actually would absent themselves on that day.²⁷⁹ In contrast, the Seventh Circuit in *Bridenbaugh* cited two recent cases upholding a Good Friday holiday in Hawaii and Kentucky where the states, like Indiana, justified their laws based on the secular purpose of providing a spring holiday.²⁸⁰ The court specifically rejected the argument that this was a "sham" secular purpose.²⁸¹ Further, because it accepted the asserted secular purpose for the holiday, it also concluded that the

270. 185 F.3d 796 (7th Cir. 1999), *cert. denied*, 2000 WL 240481 (Mar. 6, 2000).

271. See IND. CODE § 1-1-9-1 (1998).

272. *Bridenbaugh*, 185 F.3d at 798.

273. *Id.* at 799.

274. See *id.* at 796.

275. See *id.*

276. See *id.* (noting that 30% of schools in Indiana and 44% of the employees in a nine-state region, including Indiana, are off on Good Friday).

277. See *Metzl v. Leininger*, 57 F.3d 618 (7th Cir. 1995).

278. See *Bridenbaugh*, 185 F.3d at 798.

279. See *id.*

280. See *id.* at 799; see also *Koenick v. Felton*, 190 F.3d 259 (4th Cir. 1999) (upholding a Good Friday holiday for public schools in Maryland), *cert. denied*, 120 S. Ct. 938 (2000).

281. *Bridenbaugh*, 185 F.3d at 801.

law did not have the "principal" effect of advancing or endorsing religion.²⁸² The court explained that the mere fact that the state holiday may make it easier for some people to practice their faith is not dispositive because the government itself "has not used its own activities and influence to advance religion, it has not established a religion by giving a holiday on Good Friday."²⁸³

The Indiana Court of Appeals, in *Myers v. State*,²⁸⁴ rejected an Establishment Clause challenge to an Indiana statutory provision that permits institutions of higher learning accredited by the North Central Association ("NCA"), including religiously affiliated institutions, to appoint university police officers.²⁸⁵ Bristol Myers, a law student at Valparaiso University, contended that the statute violated the Establishment Clause because the State had conferred significant governmental power on religious institutions. The U.S. Supreme Court in *Larkin v. Grendel's Den, Inc.*,²⁸⁶ indeed held that the government may not confer sovereign power on churches to veto liquor licenses. The Indiana court distinguished *Larkin*, finding first that Valparaiso University is neither a church nor even a religious institution because the religious character is not "so pervasive that a substantial portion of its functions are subsumed in the religious mission."²⁸⁷ In addition, unlike *Larkin*, the State of Indiana was not giving Valparaiso University authority to exercise uncircumscribed civic power that could be used to advance its own religious interests.²⁸⁸

Applying the three-part establishment clause analysis, the court concluded that the statute had a secular legislative purpose—namely to provide all NCA accredited institutions of higher learning with the ability "to protect persons and property located on or near their premises."²⁸⁹ Second, the primary effect of the statute neither advanced nor inhibited religion. Rather, the primary benefit which flowed from the grant of this authority to form a police force was strictly secular in nature.²⁹⁰ Third, the statute did not foster excessive entanglement with religion, both because the institution is not pervasively religious and because the delegation of power in no way fused religious and governmental functions.²⁹¹

The plaintiff also contested the fact that university police officers are not subject to the law enforcement training requirements established by Indiana statute.²⁹² Although the court of appeals challenged the wisdom of exempting

282. *Id.* at 802.

283. *Id.*

284. 714 N.E.2d 276 (Ind. Ct. App. 1999).

285. *See* IND. CODE § 20-12-3.5-1 (1998).

286. 459 U.S. 116 (1982).

287. *Myers*, 714 N.E.2d at 282.

288. *See id.* at 283.

289. *Id.* at 281.

290. *See id.*

291. *See id.*

292. *See id.* at 283. It was conceded that the arresting officer did not complete the training required of police officers pursuant to IND. CODE § 5-2-1-9(d) (1998). However, the Code refers only to officers or employees hired by political subdivisions and thus private institutions, like

university officers from this type of rigorous training, and indeed Judge Sullivan in a concurring opinion suggested that this was due to statutory oversight, the Indiana legislature's failure to mandate training was not itself unconstitutional.²⁹³ In short, this was an argument better addressed to the general assembly, not the courts.

Although there were no U.S. Supreme Court decisions addressing government acknowledgment of religion last term, this Term the Court has agreed to revisit the controversial question of prayer in public schools. Since the 1960s, the Supreme Court has closely adhered to the principle that prayer in public schools is prohibited by the Establishment Clause. This is the rule regardless of whether school officials or students deliver the prayer or whether the prayer ceremony is voluntary.²⁹⁴ In *Lee v. Weisman*,²⁹⁵ the Court, in a 5-4 decision, held that the Establishment Clause outlaws the practice of public schools inviting clergy to deliver non-sectarian prayers at graduation ceremonies. Justice Kennedy found that graduation prayers bore the imprint of the "State and thus put school-age children who objected in an untenable position."²⁹⁶ He emphasized the heightened concern with protecting freedom of conscience from subtle, coercive pressure in the elementary and secondary school setting.²⁹⁷

Despite *Lee*, the Fifth Circuit in 1993 sustained a public school district's resolution permitting high school seniors to deliver non-sectarian, non-proselytizing invocations at graduation ceremonies. The court reasoned that its conduct did not coerce students to participate in religion and, therefore, did not violate the Establishment Clause.²⁹⁸ The Fifth Circuit recently revisited this issue in a case challenging the extension of the policy to permit student led prayers over the public address system at football games.²⁹⁹ The Fifth Circuit held that the extension violated the Establishment Clause because it could not be argued that the prayer was necessary to solemnize the event, since this was a football game and not a graduation ceremony.³⁰⁰ Further, "[r]egardless of whether the prayers are selected by vote or spontaneously initiated at these frequently-recurring, informal, school-sponsored events, school officials are present and

Valparaiso University, are not regulated by the provision.

293. See *id.* at 284-85.

294. See *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

295. 505 U.S. 577 (1992).

296. *Id.* at 590.

297. See *id.* at 592-96.

298. See *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993). This case was rejected by *Harris v. Joint School District*, 41 F.3d 447 (9th Cir. 1994).

299. See *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806 (5th Cir.), *reh'g en banc denied*, 171 F.3d 1013 (5th Cir.), *cert. granted in part*, 120 S. Ct. 494 (1999), and *aff'd*, 120 S. Ct. 2266 (2000). The Court's holding will be discussed in next year's Survey Issue.

300. See *id.* at 816.

have the authority to stop the prayers."³⁰¹ In granting certiorari, the Supreme Court has limited its review to the question of "[w]hether petitioner's policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause."³⁰² Although the district sought review of its policy regarding graduation ceremonies, the Court has not agreed to review that issue. This is a critical question in that many schools across the country have avoided the *Lee* decision where the prayer ceremony was student-initiated and student-led. The question is whether this eliminates the subtle coercion referred to in *Lee* or whether it will still be viewed as government endorsement of a religious message. *Lee* was a 5-4 decision in which four Justices invalidated the graduation program based on endorsement and Justice Kennedy added the critical fifth vote based on his subtle coercion analysis. Thus, both endorsement and coercion issues will no doubt be addressed by the Court.

3. *First Amendment Defense to Suits Brought Against Religious Employers.*—The U.S. Supreme Court in *Employment Division v. Smith*³⁰³ held that a state may enforce laws of general applicability even where the statutes infringe upon the free exercise of religion, provided such laws are rational.³⁰⁴ Congress attempted to undo this decision by enacting the Religious Freedom Restoration Act,³⁰⁵ which required the government to prove a compelling interest whenever it substantially burdened a person's exercise of religion.³⁰⁶ This Act, however, was short lived. The Court found it to be unconstitutional in *City of Boerne v. Flores*.³⁰⁷ Thus, because state laws prohibiting breach of contract, fraud, as well as federal anti-discrimination laws are generally applicable and rational, religious entities sued under these laws will not be permitted to avail themselves of a meaningful free exercise defense.³⁰⁸ On the other hand, the courts have long recognized a "ministerial exception" to employment claims, which is grounded not in the Free Exercise Clause, but in the Establishment Clause prohibition against government entanglement in religious matters. For example, the Indiana Court of Appeals in *Brazauskas v. Fort Wayne-South Bend Diocese, Inc.*³⁰⁹ held that the ministerial exception precluded claims brought by

301. *Id.* at 823.

302. *Sante Fe Indep. Sch. Dist.*, 120 S. Ct. at 494.

303. 494 U.S. 872 (1990).

304. *See id.* at 879.

305. 42 U.S.C. §§ 2000bb-1 to 2000bb-4 (1994).

306. *See id.* § 2000bb(a).

307. 521 U.S. 507 (1997).

308. *See, e.g., Area Plan Comm'n of Evansville & Vanderburgh County v. Wilson*, 701 N.E.2d 856 (Ind. Ct. App. 1998) (Evansville zoning code that required property owners to secure a special use permit before using their property as a school or church was a generally applicable, neutral regulation that did not impose an unreasonable burden and thus did not violate the free exercise clause; the ordinance listed 33 "special uses" and it was validly applied to a person who wished to operate a church on his property.), *trans. denied*, 714 N.E.2d 171 (Ind.), *and cert. denied*, 120 S. Ct. 527 (1999).

309. 714 N.E.2d 253 (Ind. Ct. App. 1999).

a pastoral associate against her parish and Diocese. Brazauskas alleged breach of her employment contract, fraud, promissory estoppel, intentional infliction of emotional distress, and defamation.³¹⁰ The Diocese claimed that it fired Brazauskas for expressing unorthodox views and for engaging in conduct that was offensive to church teaching. The Indiana Court of Appeals reasoned that whenever officials of a religious organization state their rationale for an employment decision "in ostensibly ecclesiastical terms,"³¹¹ here fitness for the clergy, the First Amendment effectively prohibits civil courts from reviewing these decisions.³¹² To allow courts to ascertain whether statements are defamatory or capable of a religious interpretation would effectively thrust the judiciary "into the forbidden role of arbiter of a strictly ecclesiastical dispute over the suitability of a pastoral employee to perform her designated responsibilities."³¹³

In sharp contrast, the district court in *Guinan v. Roman Catholic Archdiocese of Indianapolis*,³¹⁴ rejected application of the ministerial exception. Guinan, a fifth grade elementary school teacher employed at a Catholic institution who taught primarily secular courses, contended that although she was not a minister, she was a "Catechist" qualified to teach religion classes by virtue of her having attended a Catholic college and having taken several hours of theology.³¹⁵ She also organized the Mass at school once a month, which required selecting the music and assigning students to read passages from the Bible.³¹⁶ Nonetheless, the court rejected the institution's First Amendment ministerial defense to Guinan's Age Discrimination in Employment Act lawsuit. Although acknowledging that the ministerial exception is triggered whenever an employee's primary duties consist of spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual or worship, here the vast majority of Guinan's duties involved her teaching secular courses.³¹⁷ Non-ministers may sometimes trigger this exception to liability, but this is reserved for those positions that come "close to being exclusively religious based."³¹⁸

Although the court in *Guinan* focused on the technical status of the employee, arguably an Establishment Clause problem arises only where the rationale given by the employer for the adverse employment action would require a civic court to review church doctrine. The Archdiocese terminated Guinan's contract because it felt her teaching was weak and her classroom was in disorder.³¹⁹ Because the validity of these assertions can be examined without

310. See *id.* at 256.

311. *Id.* at 262.

312. See *id.*

313. *Id.* at 263.

314. 42 F. Supp.2d 849 (S.D. Ind. 1998).

315. *Id.* at 850.

316. See *id.* at 850-51.

317. See *id.* at 852.

318. *Id.* at 853.

319. See *id.*

regard to church doctrine, Guinan's claim of age bias did not raise an entanglement problem.³²⁰

Finally, in *McEnroy v. St. Meinrad School of Theology*,³²¹ the Indiana Court of Appeals dismissed claims of a theology professor for breach of contract, tortious interference with contract, and breach of implied covenant of good faith and fair dealing. The professor claimed she was discharged by the Roman Catholic Seminary for having publicly dissented from Pope John Paul II's position on the ordination of women.³²² The court held that adjudicating McEnroy's case would require it to interpret and apply religious doctrine and ecclesiastical law in assessing whether the archabbot properly exercised his jurisdiction over the seminary, whether the professor's conduct constituted public dissent or caused her to be "seriously deficient," and whether canon law required the archabbot to remove the professor from her teaching positions. The court reasoned that inquiry into all of these questions would excessively entangle the trial court in religious affairs in violation of the First Amendment.³²³ A certiorari petition asking whether a civil court is prohibited from applying neutral principles of law solely because a school is a religious institution was denied by the U.S. Supreme Court.

320. See *id.* at 854. The court subsequently determined that the Archdiocese had not violated the Act. See 50 F. Supp.2d 845 (S.D. Ind. 1999).

321. 713 N.E.2d 334 (Ind. Ct. App. 1999), *trans. denied*, 726 N.E.2d 313 (Ind.) (mem.), and *cert. denied*, 120 S. Ct. 1675 (2000).

322. See *id.* at 336.

323. See *id.*

1999 SURVEY OF INDIANA CONTRACT LAW

JANA K. STRAIN*

INTRODUCTION

Contract law is generally a well-settled area of law in Indiana. In this area, many of the principles taught to first-year law students hold true. For example, it is well-known that courts do not inquire into the adequacy of consideration, and the parties' judgment will not be disturbed by the courts.¹ Even though the principle is well-settled, challenges to the adequacy of consideration continue to be litigated. In our increasingly complex society, novel scenarios arise in which these solidly established principles of law must be applied. When faced with such situations, the courts must be guided by the policy underlying Indiana contract law. As the Indiana Court of Appeals explained, "Our Supreme Court has recently confirmed its commitment to advancing the public policy in favor of enforcing contracts."² In keeping with this *laissez-faire* approach to contract law, the Indiana courts hold a strong presumption of enforceability and will generally refuse to enforce a contract only in limited circumstances, such as when the contract contravenes a statute, clearly injures the public, or is otherwise contrary to the declared public policy of Indiana.³ Application of such policies guides the courts when a seemingly common issue arises in a novel context.

This Article addresses Indiana contract law cases during the survey period with a focus upon the application of these and other well-established principles in different circumstances. During the survey period, the Indiana Supreme Court handed down 293 written opinions,⁴ covering the full spectrum of Indiana law, including attorney discipline cases. However, many of these opinions fell within the supreme court's mandatory jurisdiction over criminal appeals involving sentences in excess of fifty years. Of the civil transfer cases accepted during this period, only five pertained substantially to the question of contracts. The court of appeals, which published 2166 opinions during the survey period, published only forty-four that addressed contract-related issues.⁵ This Article does not

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1. See *Tanton v. Grochow*, 707 N.E.2d 1010, 1013 (Ind. Ct. App. 1999).

2. *Town & Country Ford, Inc. v. Busch*, 709 N.E.2d 1030, 1032 (Ind. Ct. App. 1999) (citing *Trimble v. Ameritech Publ'g, Inc.*, 700 N.E.2d 1128, 1129 (Ind. 1998) (citing *Fresh Cut, Inc. v. Fazli*, 650 N.E.2d 1126, 1129 (Ind. 1995))).

3. See *Continental Basketball Ass'n, Inc. v. Ellenstein Enters., Inc.*, 669 N.E.2d 134, 139 (Ind. 1996) (citing *Fresh Cut*, 650 N.E.2d at 1130).

4. This figure reflects the actual published opinions October 1, 1998 through September 30, 1999, the dates of the survey period. This figure does not include the large number of cases considered by the court for which transfer was denied.

5. The case statistics used in this survey were derived from electronic searches of head notes and topics. There were 16 reported cases combined from both the supreme court and the court of appeals that had contracts head notes and 49 reported cases with contracts as a topic.

attempt to detail all of the reported cases, but instead focuses upon new statements of law or upon significant cases to which the practitioner's eye should be cast.

I. ENFORCEABILITY

The question of contract enforceability arises in a variety of contexts. During the survey period, the supreme court and court of appeals addressed enforceability in three significant areas: settlement agreements, exculpatory clauses, and non-compete agreements.

A. Settlement Agreements

Contract law governs construction of settlement agreements.⁶ When a settlement agreement contains a condition precedent, the contract is not binding and the parties have no obligation to perform under it unless and until the condition precedent occurs.⁷ In *Indiana State Highway Commission v. Curtis*, the supreme court reviewed a settlement agreement reached between property owners and the Indiana Department of Transportation ("INDOT").⁸ The property owners, having previously granted the State an easement on their property for highway purposes, brought suit claiming that the State had caused property damage and loss of business by its work in the easement area. INDOT's attorney participated in settlement negotiations and signed an agreement presented in writing by the plaintiffs. The agreement included a clause that provided that the agreement was subject to INDOT approval. INDOT took no further action. Forty-five days after the attorney signed the agreement, the plaintiffs filed a motion to enforce the agreement. The trial court found the agreement to be binding, and the court of appeals affirmed.⁹

The supreme court found that INDOT's approval of the settlement agreement was a condition precedent.¹⁰ Further, it explained that when an express condition is part of an agreement between the parties, that "condition must be fulfilled or no liability can arise on the promise that the condition qualifies."¹¹ However, the court also noted that performance of a condition precedent may be waived if the waiver is a "voluntary and intentional relinquishment of a known right."¹² In this case, the supreme court found that failure to gain the requisite approval did not meet the requirements to find the term waived or excused.¹³ It explained that a condition is excused only when the requirement "will involve extreme forfeiture

6. See *Indiana State Highway Comm'n v. Curtis*, 704 N.E.2d 1015, 1018 (Ind. 1998) (citing 5 I.L.E. COMPROMISE & SETTLEMENTS § 21 (1958)).

7. See *id.*

8. See *id.*

9. See *id.* at 1017.

10. See *id.* at 1018.

11. *Id.* (citations omitted).

12. *Id.* at 1019 (quoting 6 WILLISTON, CONTRACTS § 678 (3rd ed. 1961)).

13. See *id.*

or penalty and its existence or occurrence forms no essential part of the exchange for the promisor's performance."¹⁴ Because the condition precedent in this case was essential to the exchange and no evidence of extreme forfeiture or penalty existed, the supreme court held that the condition should not be excused.¹⁵

The supreme court also addressed the plaintiffs' claim that the State's failure to approve the agreement after forty-five days created an estoppel against asserting the condition precedent as a proper reason to avoid the contract. The court held that when the condition is the approval by some party, the party's obligation to make a reasonable and good faith effort to satisfy the condition requires simply that it consider the contract in good faith.¹⁶ The passage of time does not create an inference of bad faith. Rather, when INDOT did not approve the settlement agreement in a timely manner, the plaintiffs were entitled to proceed with their suit against the State.¹⁷

B. Exculpatory Clauses

In 1994, the court of appeals reached conflicting decisions regarding the enforceability of exculpatory clauses in advertising contracts. In *Pigman v. Ameritech Publishing, Inc.*,¹⁸ the court of appeals found that the exculpatory clause contained in Ameritech's Yellow Pages advertising contract was unconscionable and void as against public policy. Shortly thereafter, a different panel of the court of appeals in *Pinnacle Computer Services, Inc. v. Ameritech Publishing Inc.*,¹⁹ held that the exculpatory clause was valid and enforceable. During this survey period, the supreme court granted transfer in *Trimble v. Ameritech Publishing, Inc.*²⁰ to resolve the problem.

The exculpatory clauses in each of the cases limited the liability of the publisher to an amount equal to the contract price or the sum of money actually paid by the customer, whichever is less, as liquidated damages.²¹ The supreme court held that such clauses are enforceable based upon the court's long-expressed position that it is in the best interest of the parties not to restrict unnecessarily their freedom of contract.²² The supreme court then looked to five factors that might indicate that a contract is against public policy:

(1) the nature of the subject matter of the contract; (2) the strength of the public policy underlying any relevant statute; (3) the likelihood that

14. *Id.* (quoting 5 WILLISTON, CONTRACTS § 769 n.2 (3rd ed. 1961) (quoting RESTATEMENT OF CONTRACTS § 302 (1932))).

15. *See id.*

16. *See id.* (quoting *Hamlin v. Steward*, 622 N.E.2d 535, 540 (Ind. Ct. App. 1993)).

17. *See id.*

18. 641 N.E.2d 1026 (Ind. Ct. App. 1994).

19. 642 N.E.2d 1011 (Ind. Ct. App. 1994).

20. 700 N.E.2d 1128 (Ind. 1998).

21. *See id.* at 1128-29 & 1129 n.2 (noting that the exculpatory clauses in *Pigman* and *Pinnacle Computer Servs.* were similar to the clause in this case).

22. *See id.* at 1129.

refusal to enforce the bargain or term will further any such policy; (4) how serious or deserved would be the forfeiture suffered by the party attempting to enforce the bargain; and (5) the parties' relative bargaining power and [their respective] freedom to contract.²³

The court found that the second and third factors did not apply to this dispute.²⁴ As to the other three factors, the court adopted, without discussion, the reasoning of the court of appeals in *Pinnacle*, in favor of enforceability of the contract.²⁵

In *Pinnacle*, the plaintiff-appellant, Pinnacle Computer Services, engaged in the business of sale, repair, and installation of computer-related equipment.²⁶ Pinnacle's president met with an Ameritech Yellow Pages sales representative to order advertising. The two reviewed changes to Pinnacle's prior advertising, and, when the changes were satisfactory, Pinnacle's president signed the order form. When the Yellow Pages was published, Pinnacle's advertisement was mistakenly placed in the wrong section. Pinnacle filed suit for damages, and the trial court granted summary judgment to Ameritech based upon the exculpatory clause on the reverse side of the advertising order form.²⁷ Pinnacle appealed, claiming that the exculpatory clause was unenforceable for three reasons: "(1) the parties had unequal bargaining power; (2) the clause was unconscionable; and (3) the transaction affected the public interest."²⁸

On appeal, Pinnacle first argued that the provision was unenforceable because it was pre-printed on a form contract and that the parties had unequal bargaining power. The court of appeals rejected the argument that a form contract was per se unenforceable, instead requiring the challenger to establish that the contract is against public policy because one party's limited bargaining power puts him at the mercy of the other's negligence.²⁹ Although the court of appeals agreed that Ameritech was the only supplier of the service that Pinnacle sought, it held that Pinnacle was not an uninformed consumer coerced by a fraudulent company.³⁰

The court of appeals also rejected Pinnacle's argument that it was unaware of the clause.³¹ Specifically, it noted that Pinnacle's president had signed the order form directly under text that said: "I have read and understand the terms and conditions on the face and reverse side, *particularly the paragraph which limits my remedies and publisher's maximum liability in the event of error or*

23. *Id.* at 1130.

24. *See id.*

25. *See id.*

26. *See Pinnacle Computer Servs., Inc. v. Ameritech Publ'g Inc.*, 642 N.E.2d 1011, 1012 (Ind. Ct. App. 1994).

27. *See id.*

28. *Id.* at 1016.

29. *See id.*

30. *See id.*

31. *See id.* at 1017.

omission.”³² The court of appeals found that Ameritech had not denied Pinnacle’s president the opportunity to read the contract and that Pinnacle did not claim that it even attempted to read or discuss the terms of the order.³³ As a result, the court of appeals refused to relieve Pinnacle of its agreement under the contract based upon an argument that it had not read the agreement.³⁴

Next, the court of appeals reviewed Pinnacle’s claim of unconscionability in light of the seminal case of *Weaver v. American Oil*.³⁵ Pinnacle argued that the exculpatory clause in this case was like the clause in *Weaver* in that it was printed on the reverse of a pre-printed form contract prepared by Ameritech. The court of appeals rejected this argument based upon the distinctive facts in *Weaver* that demonstrated the unconscionability of that agreement.³⁶ As the court of appeals explained, the plaintiff in *Weaver* was a man with less than a high school education who signed a contract with American Oil for the operation of a service station. The contract contained an exculpatory clause on the reverse of the agreement in small print, blended into text in such a manner that the reader might not even notice it. In addition, the plaintiff in *Weaver* never read the clause and no one ever explained it to him. Further, the clause limited American Oil’s liability for its own negligence and required Weaver to indemnify American Oil for damages resulting from American Oil’s negligence.³⁷ Distinguishing the facts in this case, the court of appeals noted that Pinnacle’s president ran a sophisticated business, had the ability to read the agreement, and was not compelled by the contract to indemnify Ameritech for damages caused by its own negligence.³⁸ As such, the agreement was not unconscionable.³⁹

Pinnacle’s third argument, that the transaction affected the public interest, was likewise rejected.⁴⁰ While generally public policy does not prohibit contracts with exculpatory clauses, Pinnacle argued that the contract fell within an exception for transactions that affect the public interest. Such exceptions include public utilities, common carriers, innkeepers, and public warehousemen, as well as situations when one party’s indispensable need for the services of another deprives the customer of all real bargaining power.⁴¹ Under these exceptions, courts have held that exculpatory clauses are unconscionable when the provider of an indispensable service refuses to serve a customer unless he agrees to limit the service provider’s liability for its own negligence.⁴² The court

32. *Id.* at 1013 (emphasis added).

33. *See id.* at 1017.

34. *See id.*

35. 276 N.E.2d 144, 146 (Ind. 1971).

36. *See id.*

37. *See id.*

38. *See id.*

39. *See id.*

40. *See id.* at 1018-19.

41. *See id.* at 1017-18.

42. *See id.* at 1018.

of appeals, however, found that the Yellow Pages is not a public utility.⁴³ It acknowledged that the Yellow Pages was a subsidiary of Ameritech, Inc., which also owned Indiana Bell Telephone Co., and, that, as a result, Ameritech was subject to regulation.⁴⁴ However, it found the Yellow Pages was a separate legal entity.⁴⁵ The court of appeals concluded that the publication of the Yellow Pages was a wholly private concern, not within the exception for indispensable services.⁴⁶ Although the Yellow Pages might be the preferred advertising mode, there were other alternatives available that would have provided a similar service.

The court of appeals also noted that the failure to enforce the exculpatory clause would subject Ameritech to potentially unlimited consequential damages that would be disproportionately high in comparison to the contract price paid for the advertising.⁴⁷ Significantly, however, the court of appeals also "cautioned" Ameritech that there are limits to the enforceability of exculpatory clauses and circumstances may occur in which unequal bargaining power between the parties or misrepresentation of the terms would support a finding of unconscionability.⁴⁸

By adopting *Pinnacle* in *Trimble*, the supreme court held the parties to the terms of their freely-bargained contract, including its exculpatory clause.⁴⁹ The court stated that the fact that the clause is a "boilerplate" is not dispositive, so long as the facts show that the accepting party had the opportunity to review and accept the terms. The cautionary language of *Pinnacle* should remind parties to be aware that when there is a challenge to an exculpatory clause, the court will look beyond the face of the agreement to assure that the facts surrounding the contract formation are consistent with public policy.

C. Non-Compete Agreements

Covenants not to compete, or non-compete agreements, are disfavored by law because they are a restraint on trade. Such agreements, however, will be enforced when they meet certain requirements. In *McGlothen v. Heritage Environmental Services, L.L.C.*,⁵⁰ the court of appeals affirmed the trial court's grant of a preliminary injunction to the former employer.⁵¹ In *McGlothen*, the employer required its employee to sign a non-compete agreement as a condition of employment. The agreement prohibited the employee from soliciting business from the employer's customers within twelve months of the termination of his employment, engaging in direct competition with the employer within twelve months of termination within the principal places of his employment (including

43. See *id.*

44. See *id.*

45. See *id.*

46. See *id.*

47. See *id.*

48. *Id.* at 1019.

49. See *Trimble v. Ameritech Publ'g, Inc.*, 700 N.E.2d 1128, 1130 (Ind. 1998).

50. 705 N.E.2d 1069 (Ind. Ct. App. 1999).

51. See *id.* at 1075.

the entire state in which he regularly worked for the employer), and disclosing any "trade secret, plan or method of operation, or special or confidential information employed in and conducive to" the employer's business.⁵² The employee left the business and was subsequently employed by two of the employer's competitors. The employer sought a temporary restraining order and preliminary injunction based upon the non-compete agreement. The preliminary injunction was granted, and the employee's request for certification of an interlocutory appeal was granted.⁵³

The court of appeals set forth the requirements for the enforcement of a non-compete agreement: "(1) the restraint is reasonably necessary to protect the employer's business; (2) it is not unreasonably restrictive of the employee; and (3) the covenant is not antagonistic to the general public."⁵⁴ It also noted that the employer must demonstrate some unique facts that give the former employee some special advantage or ability to harm the employer, such as trade secrets, confidential information like customer lists, or the existence of a confidential relationship.⁵⁵ The employer is not entitled to protection for an employee's knowledge, skill, or general information acquired as a result of the employment.⁵⁶ Further, an employer may have a protectable interest in information that is gleaned from public sources if that information is the result of extensive compiling efforts.⁵⁷

The facts in this case demonstrated that although all project managers were provided with the information the employee retained and used, they were all required to sign confidentiality and non-compete agreements. The employer considered the information "absolutely confidential." In addition, one of the documents recovered from the employee was stamped "confidential."⁵⁸ As a result of this evidence, the court of appeals upheld the trial court's conclusion that the employer had a protectable interest in the information held by the employee.⁵⁹

The employee next argued that the employer had no protectable interest in the good will of the company that would prevent him from contacting his former customers or using his relationship with them to his own advantage.⁶⁰ The court of appeals found that the exclusivity of the employee's contact with the customer went to the extent and degree of the good will, not to whether the employer is

52. *Id.* at 1071.

53. *See id.*

54. *Id.* at 1071-72 (citing *Slisz v. Munzenreider Corp.*, 411 N.E.2d 700, 704 (Ind. Ct. App. 1980)).

55. *See id.* at 1072 (citing *Slisz*, 411 N.E.2d at 704).

56. *See id.* (citing *Century Personnel, Inc. v. Brummett*, 499 N.E.2d 1160, 1163 (Ind. Ct. App. 1986)).

57. *See id.* (citing *Amoco Prod. Co. v. Laird*, 622 N.E.2d 912 (Ind. 1993)).

58. *Id.*

59. *See id.* at 1073.

60. *See id.*

entitled to protection.⁶¹ Thus, evidence that the employee had been involved in direct contact with the employer's customer and garnered repeat business (a source of protectable good will) was sufficient to establish that the employer had a protectable interest in its good will.⁶²

Having concluded that the employer had a protectable interest, the court of appeals reviewed whether the trial court correctly granted the preliminary injunction.⁶³ The employee asserted that the employer had failed to meet its burden on three of the four elements required for the grant of a preliminary injunction, namely: (1) an inadequate remedy at law, causing irreparable harm pending resolution of the substantive action; (2) a reasonable likelihood of success at trial; and (3) that the threatened injury to the employer outweighing the potential harm to the employee.⁶⁴ The employee did not challenge whether the public interest would be disserved by the injunction.⁶⁵

The court of appeals rejected the employee's claim that economic injury alone may not serve as the basis for injunctive relief.⁶⁶ Rather, the court of appeals found that the employer would suffer irreparable harm to its reputation, damage to its good will, and potential downsizing and reduction in force as a result of these losses that were sufficient to support the injunction.⁶⁷ Next, the court of appeals concluded that because the employer was successful on appeal regarding the question of a protectable interest, there was a reasonable likelihood of success on the merits to support the preliminary injunction.⁶⁸ Finally, balancing the competing harms, the court determined that the clause did not prevent the employee from obtaining employment outside the territory specified in the agreement or with one of the employer's customers.⁶⁹ Thus, despite the employee's difficulty finding and keeping employment because of the non-compete agreement, the harm to the employer outweighed the harm to the employee.⁷⁰

Although the employee did not contend that the public interest would be disserved by enforcing the agreement, and it was accordingly not addressed, it is significant to note that the agreement defined the restrictions as:

Employee further agrees that he will not at any time . . . within twelve (12) months after leaving or termination of said services . . . for himself or any other person, firm, or corporation, engage in the business of

61. *See id.*

62. *See id.*

63. *See id.*

64. *See id.* at 1074 (citing *Jay County Rural Elec. Membership Corp. v. Wabash Valley Power Ass'n, Inc.*, 692 N.E.2d 905, 908-09 (Ind. Ct. App. 1998)).

65. *See id.*

66. *See id.*

67. *See id.* at 1074-75.

68. *See id.* at 1075.

69. *See id.*

70. *See id.*

industrial waste management or *any other business that is in competition with Employer* (a) within the *principal State* of his employment, or (b) within any other city, county or state where Employee had, within twelve (12) months prior to his leaving . . . rendered services for or on behalf of the Employer.⁷¹

Thus, the agreement did not preclude all employment. However, it prohibited the employee from activities that conflict not only with the specific type of business in which the employee was engaged by the employer, but also with *any other business that competes with the employer*. This certainly raises the question whether such broad language should be enforced if the employer is a subsidiary of a large, multi-industry conglomerate. Such an agreement may effectively create an ever-increasing list of industries in which the employee might be prohibited from working because the other, seemingly unrelated, businesses conflict with some other subsidiary of the employer.

Further, this particular agreement restricted the employee's job market throughout the *entire state* in which the employer conducted its primary business, apparently without regard to the breadth of the employee's actual territory. It also restricted the employee in the localities in which the employee *actually had served* the employer. Presumably then, these might be different areas or different states. Under such circumstances, if the employer's primary business was in Indiana, but the employee's territory covered only one county, this agreement ostensibly could require the employee to leave the state in order to continue his career. Even though this does not appear to have been at issue in the instant case, it does present a question whether the public's interest is disserved by an agreement that could require tax paying citizens to leave Indiana in order to obtain employment.

II. INTERPRETATION

Although Indiana courts enforce agreements in accordance with the parties' intent, the dispute sometimes requires the courts to determine the parties' intent by first interpreting the terms in the agreement itself. During the survey period, the supreme court provided guidance in interpreting marital agreements and terms of uninsured/underinsured motorist liability coverage. Additionally, the court of appeals provided guidance in interpreting employment agreements and policy language coordinating insurance coverage.

A. Marital Agreements

One of the more significant developments from the Indiana Supreme Court during the survey period clarified the treatment of agreements between spouses. In *Pond v. Pond*,⁷² a husband and wife executed an agreement during the marriage, but after the husband filed a petition for legal separation. The couple

71. *Id.* at 1071 (emphasis added).

72. 700 N.E.2d 1130, 1132 (Ind. 1998).

subsequently divorced. The husband claimed that the agreement should be construed the same as an antenuptial agreement.⁷³ The supreme court, noting that it had never directly addressed such a claim, considered the case of *Flansburg v. Flansburg*,⁷⁴ in which the court of appeals addressed the question of interpretation of an agreement entered during marriage. In *Flansburg*, the couple had separated at the time the agreement was signed, but reconciled as a result of the agreement. The supreme court explained that the court of appeals in *Flansburg* had found:

While the property settlement labeled a "Post Nuptial Agreement" was negotiated by the parties well into their marriage, it primarily concerned the distribution of property interests acquired prior to the marriage. Just as marriage is, in and of itself, valued and respected by the law as adequate consideration to support an antenuptial agreement, *the extension of a marriage that would have otherwise been dissolved but for the execution of an agreement to reconcile has been deemed adequate consideration.*⁷⁵

The supreme court concluded that the construction of the spousal agreement was an issue of law requiring a review of the facts surrounding the formation of the agreement.⁷⁶

The court found significant the content of the agreement, as well as its timing in relation to the dissolution of the marriage.⁷⁷ The negotiation of the agreement was initiated by the husband shortly before he filed a Petition for Legal Separation. The negotiation continued after the petition was filed. When the agreement was finally signed by the parties, without the assistance of counsel, it was expressly limited to two years from the date the husband filed the separation petition.⁷⁸ The terms of the agreement detailed the division of the marital property in the event of dissolution, relinquished claims for temporary or spousal support and all statutory inheritance rights, and allocated attorney fees in the event of a challenge to the agreement. It also included a severability clause that declared the remainder of the agreement valid in the event any portion was found to be invalid, unlawful, or void. The only term in the agreement addressing the children was a term for support during the period prior to dissolution.⁷⁹

Immediately after signing the agreement, the parties began dividing and

73. As the supreme court explained, agreements entered in contemplation of marriage are often referred to as prenuptial, premarital, or antenuptial agreements. *See id.* When such agreements are valid, they must be enforced as written. *See id.* However, such agreements may become voidable as unconscionable due to circumstances existing at the time of the dissolution. *See id.* at 1133 n.3.

74. 581 N.E.2d 430 (Ind. Ct. App. 1991).

75. *Pond*, 700 N.E.2d at 1133 (quoting *Flansburg*, 581 N.E.2d at 433-34).

76. *See id.*

77. *See id.* at 1134.

78. *See id.* at 1133.

79. *See id.* at 1134.

distributing the marital property in accordance with its terms, which required distribution to occur within ten days of signing. The husband's attorney began preparing a qualified domestic relations order that divided the husband's pension and retirement benefits as of the date of the filing of the separation petition. Shortly thereafter, the wife filed a petition for dissolution.⁸⁰ The supreme court concluded that these events suggested that the parties entered the agreement in anticipation of dissolution, and therefore the agreement should be treated under the Dissolution of Marriage Act rather than as a reconciliation agreement.⁸¹

The court also addressed the enforceability of the provision shifting attorney fees.⁸² The court explained that settlement agreements are encouraged under the Indiana Dissolution of Marriage Act and declined to construe narrowly the terms of the Act to limit the parties from contracting regarding attorney fees.⁸³ Under the Act, a court is not bound to accept every proffered settlement. Instead the court should concern itself only with fraud, duress, and other imperfections of consent, or with manifest inequities, particularly those deriving from great disparities in bargaining power.⁸⁴ Because the parties are free to make whatever financial arrangements they wish, and a contract for attorney fees is enforceable according to its terms unless contrary to law or public policy, the trial court should exercise its power to disapprove of such an agreement with great restraint.⁸⁵ The trial court did not find that the agreement was a result of fraud, duress, or misrepresentation.⁸⁶ Rather, it found the contract valid, but chose not to enforce the attorney fee provision because it was written to allow only the husband, a wealthy doctor, the power to challenge the agreement, while the wife, who had very little income, would be unable to afford the cost of the challenge.⁸⁷ The supreme court found that the terms of the provision were far narrower than the trial court had considered and applied only to attorney fees "incurred in the prosecution or defense of 'an attack by one party as to the validity of [the] agreement'"⁸⁸ and did not apply to "attorney fees relating to the resolution of property division, maintenance, custody, visitation, support, or other issues often incidental to dissolution proceedings."⁸⁹ Thus, the wife could seek attorney fees pursuant to section 31-1-11.5-16 of the Indiana Code for her fees related to all issues except the validity of the agreement.⁹⁰

This case demonstrates that although the supreme court will give great deference and respect to the judgment of the parties in the formation of their

80. *See id.*

81. *See id.* at 1135.

82. *See id.* at 1135-36.

83. *See id.* at 1136.

84. *See id.* (citing *Voight v. Voight*, 670 N.E.2d 1271, 1278 (Ind. 1996)).

85. *See id.* (quoting *Voight*, 670 N.E.2d at 1277).

86. *See id.*

87. *See id.*

88. *Id.* at 1137 (quoting IND. CODE § 31-1-11.5-16 (1998)).

89. *Id.*

90. *See id.*

contract, it will look beyond labels to the purpose and effect of the agreement to determine how it should be enforced.

B. Employment Agreements

A frequent issue in Indiana law is the interpretation of employment contracts upon termination of employment. During the survey period, the court of appeals addressed a breach of contract claim based upon an employment contract.⁹¹ The trial court concluded that the employment contract was terminable at will because there was no termination date in the contract.⁹² On appeal, the employee argued that the trial court's grant of summary judgment was erroneous due to a security provision in the contract. The employee argued that the parties had modified the standard employment contract to permit termination only for just cause and, although the contract contained no express time limits, the discontinuation of sales to the specific company identified in the contract would terminate the employer's obligation under the contract.⁹³

In contrast, the standard contract provided for termination by either party with sixty days written notice, with or without cause. It also allowed the employer to change the employee's responsibilities as it deemed advisable. However, the employee negotiated these terms and the employer agreed to provisions that provided, among other things, that the employment "shall continue indefinitely, unless and until terminated by either party as hereinafter provided" and "this agreement may be terminated by either party *for just cause*, upon sixty (60) days written notice."⁹⁴

The court of appeals noted that the determination of whether a party is employed at will is a legal question.⁹⁵ Further, it stated the doctrine of employment at will is a rule of contract construction, not a rule imposing substantive limitations on the parties' freedom to contract.⁹⁶ Thus, the presumption of at-will employment may be negated when the parties include a clear job security provision in the employment contract.⁹⁷ The court of appeals concluded that the parties had freely negotiated the security provisions in the contract, and it could not change its terms through interpretation.⁹⁸ Accordingly, the agreement to add the just cause provision rebutted whatever presumption of at-will employment might be raised by the use of the term "indefinitely" in the

91. See *Eck & Assoc., Inc. v. Alusuisse Flexible Packaging, Inc.*, 700 N.E.2d 1163 (Ind. Ct. App. 1998), *trans. denied*, 714 N.E.2d 167 (Ind. 1999) (mem.).

92. See *id.* at 1166.

93. See *id.*

94. *Id.* at 1168 (emphasis added).

95. See *id.*

96. See *id.* at 1167 (citing *Orr v. Westminster Village North, Inc.*, 689 N.E.2d 712, 717 (Ind. 1997) (citing *Streckfus v. Gardenside Terrace Co-op, Inc.*, 504 N.E.2d 273, 275 (Ind. 1987))).

97. See *id.*

98. See *id.* at 1169.

contract.⁹⁹

The court of appeals also rejected the employer's argument that the job security provision required adequate independent consideration to rebut the presumption of at-will employment.¹⁰⁰ In doing so, it explained that the cases requiring adequate independent consideration were not applicable in this case, not due to the lack of written contracts, but because they lacked explicit, freely bargained-for "just cause" provisions.¹⁰¹ According to the court of appeals, those cases presented employees arguing that some consideration transformed a clearly at-will employment situation into one that could be terminated only for cause.¹⁰² In this case, the court of appeals found the at-will employment was transformed by the freely-bargained-for, express just cause provision and thus, no additional consideration was necessary to transform the employment term.¹⁰³

C. Insurance Contracts

An insurance contract is subject to the same rules of interpretation as other contracts under Indiana law and its interpretation is primarily a question of law for the court.¹⁰⁴ Clear and unambiguous policy language is given its plain and ordinary meaning, but ambiguities are construed in favor of the insured.¹⁰⁵

1. *Uninsured/underinsured Motorist Coverage*.—In some cases, the terms of a contract are supplemented by statutory requirements for coverage. Recently, the Seventh Circuit Court of Appeals certified a question to the Indiana Supreme Court, asking the court to evaluate an umbrella or excess liability policy in light of Indiana's uninsured/underinsured motorist statute.¹⁰⁶

In *United National Insurance Co. v. DePrizio*, the supreme court determined that interpretation of such insurance policies requires consideration of the uninsured/underinsured motorist statute's objectives.¹⁰⁷ An umbrella or excess liability insurance policy is an insurance contract that affords coverage to the insured in excess of the underlying policy's limits for liability to third persons. In this case, the court was asked to determine whether such a policy is an "automobile liability or a motor vehicle liability policy" that would be required by statute to include uninsured or underinsured coverage.¹⁰⁸ The court specifically noted that there was no dispute that the umbrella policy covered the

99. *Id.*

100. *See id.*

101. *Id.*

102. *See id.* at 1169-70.

103. *See id.* at 1170.

104. *See American Family Life Assurance Co. v. Russell*, 700 N.E.2d 1174, 1174 (Ind. Ct. App. 1998), *trans. denied*, 714 N.E.2d 168 (Ind. 1999) (mem.).

105. *See id.*

106. *See United Nat'l Ins. Co. v. DePrizio*, 705 N.E.2d 455, 457 (Ind. 1999).

107. *See id.* at 459.

108. *Id.* at 458.

insured for liability to third persons.¹⁰⁹ One of the policy's provisions covered automobile liability, clearly including liability arising out of the ownership, maintenance, or use of a motor vehicle by or on behalf of the insured.¹¹⁰

The supreme court noted that, in contrast to uninsured/underinsured motorist statutes in other states, Indiana's statute is a "mandatory coverage, full-recovery, remedial statute"¹¹¹ that is "considered a part of every automobile liability policy the same as if written therein."¹¹² As a result, even when an insurance contract fails to provide such coverage, the beneficiary is entitled to it unless it is expressly waived in accordance with the law.¹¹³ After reviewing the statute's history, the supreme court concluded that the legislature intended to give insured motorists the opportunity for full compensation when injuries were caused by financially irresponsible motorists.¹¹⁴ Thus, the court concluded that legislative intent compelled a finding that an umbrella policy falls within the scope of the uninsured/underinsured motorist statute when the umbrella policy by its terms covers risks above those insured in an underlying automobile policy.¹¹⁵

In reaching its decision, the supreme court noted that the cases relied upon by the insurance company, notably *Marshall v. Universal Underwriters*¹¹⁶ and *Hastings Mutual Insurance Co. v. Webb*¹¹⁷ relied upon the supreme court's earlier interpretation of the uninsured/underinsured motorist statute in *City of Gary v. Allstate Insurance Co.*,¹¹⁸ construing the 1986 version of the statute.¹¹⁹ The supreme court noted that *City of Gary* accurately reflected the language of the statute in effect in 1986, but also that significant subsequent legislation modified the statute.¹²⁰ Accordingly, the supreme court disapproved the court of appeals' decisions that failed to make this distinction, including the two cases cited by the insurance company.¹²¹

2. *Coordination of Insurance Policies.*—The court of appeals addressed a question that could be likened to coordination of benefits under automobile policies. In *General Accident Insurance Co. of America v. Hughes*,¹²² a driver was permitted to test drive a vehicle from a dealer lot. While on the test, the driver was involved in an accident resulting in her injury and the death of one of the passengers in the other car, as well as an injury to a second passenger in that

109. See *id.* at 457.

110. See *id.* at 458.

111. *Id.* at 460 (citing IND. CODE § 27-7-5-2).

112. *Id.* (quoting *Indiana Ins. Co. v. Noble*, 265 N.E.2d 419, 425 (1970)).

113. See *id.* (quoting *Noble*, 265 N.E.2d at 425).

114. See *id.* at 461.

115. See *id.*

116. 673 N.E.2d 513 (Ind. Ct. App. 1996).

117. 659 N.E.2d 1049 (Ind. Ct. App. 1995).

118. 612 N.E.2d 115 (Ind. 1993).

119. See *DePrizio*, 705 N.E.2d at 461.

120. See *id.*

121. See *id.*

122. 706 N.E.2d 208 (Ind. Ct. App. 1999), *trans. denied*, 726 N.E.2d 299 (Ind. 1999) (mem.).

car. The driver carried insurance at the minimum levels required by Indiana law and the dealership maintained a "garage general liability" policy on the permissive driver of the vehicle.¹²³ Under the terms of the respective policies, it was unclear which policy would cover the passengers and to what extent.¹²⁴

The driver's personal policy provided that if other liability insurance was responsible for payment, the driver's insurance provider would pay only its share of liability. It also provided that when the driver did not own the vehicle, any collectible insurance on the vehicle would be the primary insurance, and the driver's policy would provide excess coverage. Likewise, the garage policy provided that when a vehicle was operated by a customer of the dealership with other coverage, the driver's individual coverage would be primary and the garage policy would provide excess coverage.¹²⁵ The garage policy also provided that it would cover such an individual only up to the statutory minimum in the event that primary coverage failed to meet those minimums.

After reviewing the text of both policies, the court of appeals concluded that Indiana law requires that "[r]ecover may not be made under the garage liability policy until the limits of all coverage available to the [driver] have been exhausted."¹²⁶ Thus, the driver's policy was primary.¹²⁷ In addition, limiting the coverage to the gap between the primary insurance and the statutory minimum was valid and did not violate public policy because it met the legislative policy of assuring minimum levels of uninsured motorist coverage.¹²⁸

The court of appeals addressed similar difficulties in coordinating insurance payments in *Wildman v. National Fire and Marine Insurance Co.*¹²⁹ In *Wildman*, the plaintiff was injured in an automobile-motorcycle collision while on the job and subsequently received worker's compensation benefits. Ultimately, he reached a settlement agreement with the driver of the other vehicle for \$100,000 and the worker's compensation carrier enforced a lien in excess of \$31,000 against the settlement. The plaintiff then sought underinsured motorist coverage from the defendant, National, which provided underinsured motorist liability coverage for the plaintiff's employer with a policy limit of \$300,000. National claimed that it should be able to set off the total worker's compensation benefit paid to the plaintiff, without adjusting the amount repaid under the lien.¹³⁰

The contract language provided "[a]ny amount payable under this coverage shall be reduced by all sums paid or payable under any worker's compensation disability benefits or similar law."¹³¹ The court of appeals found the phrase

123. *Id.* at 209.

124. *See id.*

125. *See id.*

126. *Id.* at 211 (quoting IND. CODE ANN. § 27-8-9-10 (Michie 1994)).

127. *See id.*

128. *See id.* (citing *Harden v. Monroe Guar. Ins. Co.*, 626 N.E.2d 814 (Ind. Ct. App. 1993)).

129. 703 N.E.2d 683 (Ind. Ct. App. 1998), *trans. denied*, 714 N.E.2d 173 (Ind. 1999) (mem.).

130. *See id.* at 685.

131. *Id.* at 686.

"sums paid or payable" ambiguous and construed the contract in favor of the insured, permitting a set-off of only the benefits received that were not subject to a repayment obligation.¹³² The court of appeals noted that this construction was consistent with public policy concerns because it reduced the insurer's liability only to the extent that the plaintiff actually received other compensation.¹³³

3. *Exclusionary Clauses*.—Also during the survey period, the court of appeals considered the question of an exclusionary clause denying insurance coverage in *American Family Life Assurance Co. v. Russell*.¹³⁴ An exclusionary clause is ordinarily entitled to enforcement, but it must clearly and unmistakably bring within its scope the particular act or omission that will bring the exclusion into play.¹³⁵ Any doubts regarding coverage must be construed against the insurer to further the policy's primary purpose of indemnity.¹³⁶

In *American Family Life Assurance Co. v. Russell*,¹³⁷ the court of appeals applied these standards to an exclusionary clause that provided, in part: "We will not pay benefits for an accident that is caused by or occurs as a result of a covered person . . . [p]articipating in any activity or event, including the operation of a [motor] vehicle, while intoxicated."¹³⁸ The decedent was legally intoxicated at the time of his death and was struck by a train while lying unconscious on the tracks. The court of appeals found that the evidence designated by the insurer did not demonstrate that the decedent was participating in any activity or event at the time of his death.¹³⁹ In its response to an interrogatory asking what activity or event the insurer found the decedent had engaged in causing his death, the insurer responded that "the fact that [the decedent] was intoxicated . . . satisfies the exclusion of coverage under its policy and prohibits payment to any beneficiary."¹⁴⁰

The court of appeals, applying the plain meaning of the terms "participate," "activity," and "event," concluded that the decedent was not participating in any activity or event when he was lying unconscious on the tracks.¹⁴¹ Thus, the exclusion did not apply.¹⁴²

132. See *id.* at 687 (quoting ALAN I. WIDIS, UNINSURED AND UNDERINSURED MOTORIST INSURANCE § 41.7, at 304-05 (2d ed. 1995)).

133. See *id.*

134. 700 N.E.2d 1174 (Ind. Ct. App. 1998), *trans. denied*, 714 N.E.2d 168 (Ind. 1999) (mem.).

135. See *id.* at 1177.

136. See *id.*

137. *Id.* at 1174.

138. *Id.* at 1176.

139. See *id.* at 1178.

140. *Id.*

141. *Id.*

142. See *id.*

III. SANCTIONS

In a recent case involving the release of one tortfeasor and her insurance company, the court of appeals took the extraordinary step of awarding, sua sponte, appellate attorney fees as a sanction for the bad faith actions of another insurance company's counsel. In *GEICO Insurance Co. v. Rowell*,¹⁴³ the plaintiff was injured in an automobile accident involving two other vehicles and their drivers. Rowell subsequently settled her claim against one driver and her insurance carrier and executed a release provided by that insurance company. When Rowell's attorney reviewed the release prior to submitting it, she discovered it incorrectly purported to release all other parties.¹⁴⁴ Rowell's attorney called this to the attention of the two insurance companies, and both companies' attorneys agreed to allow Rowell to correct the release by attaching a stipulation to be signed by all parties, clarifying that the release would discharge only the first driver and her carrier, American States.¹⁴⁵ Rowell's attorney submitted the agreed stipulation and it was signed by all parties. After Rowell dismissed American States and its insured from the action, GEICO filed a motion for summary judgment based upon the release. In order to adequately respond to the motion, Rowell was forced to obtain several time extensions because she was unable to depose the attorney from American States to establish that all parties had agreed that only American States and its insured would be released and dismissed from the action.¹⁴⁶

The court of appeals reviewed the history of the summary judgment action and found that, although the release itself purported to release all parties, it must be interpreted in accordance with the intent of the parties at the time it was signed.¹⁴⁷ Accordingly, the court found that the stipulation limiting the release was executed as part of the transaction.¹⁴⁸ As a result, the court agreed with the trial court that the stipulation should be considered a contemporaneous document and that GEICO's motion for summary judgment should be denied.¹⁴⁹ In reaching this decision, the court of appeals noted that GEICO asked the court to "close its eyes" to the stipulation it signed.¹⁵⁰ Addressing this, the court said: "There was a time in the practice of law when an attorney's word was his bond. . . . GEICO 'knew full well that the release was specifically directed [at the other driver and her insurance carrier].'"¹⁵¹

However, GEICO also sought sanctions against Rowell and her attorney, alleging they had taken a "course of conduct for no good purpose other than to

143. 705 N.E.2d 476 (Ind. Ct. App. 1999).

144. See *id.* at 478.

145. See *id.*

146. See *id.* at 479.

147. See *id.* at 480-81.

148. See *id.* at 482.

149. See *id.*

150. *Id.* at 481.

151. *Id.* (quoting the trial court's findings of fact) (footnotes omitted).

obfuscate the issues, delay the proceedings and circumvent the meaning and intent of the Rules of Appellate Procedure.”¹⁵² Although the court of appeals acknowledged it had rejected two motions filed by Rowell, it denied GEICO’s motion for sanctions.¹⁵³ The court of appeals did not simply reject GEICO’s claim, but instead made the following comment:

Furthermore, we find it ironic that GEICO is requesting the imposition of sanctions against Rowell. In light of the actions of GEICO’s counsel and pursuant to our authority under App. R. 15 (G), we find *sua sponte* that damages should be assessed against GEICO’s counsel in the amount of Rowell’s appellate attorney fees.¹⁵⁴

This action by the court of appeals is a strong reminder that the courts expect forthright behavior from parties in the creation and enforcement of contracts. Further, when read in conjunction with the court’s statement regarding an attorney’s word being his bond, this should serve as a strong reminder that attorneys are expected to perform within the full letter of the professional rules when making representations to the parties and to the court.

CONCLUSION

Indiana contract law during the survey period demonstrates that Indiana’s appellate courts practice what they preach—they accord great respect to the parties who crafted their contracts and generally enforce the terms as written, so long as the facts surrounding the agreement support enforcement. Although the cases reviewed in this survey set precedent that will guide litigants in specific new areas of law, the rules espoused are clearly in line with Indiana contract policy. This policy—and the stability that such consistent contract law provides—creates a solid foundation for the application of these principles in the novel circumstances we may expect as the social landscape and the citizens’ needs change with the advent of more sophisticated technology.

152. *Id.* at 482.

153. *See id.*

154. *Id.* at 483 (footnotes omitted).

RECENT DEVELOPMENTS IN INDIANA CRIMINAL LAW AND PROCEDURE

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This Article will survey developments in the area of criminal law and procedure that were enacted by the 1999 Indiana General Assembly and addressed by the Indiana appellate courts since the last Survey.

I. 1999 LEGISLATIVE ENACTMENTS

A. *Victim Rights*

The legislature created a new article in Title 35 that seeks to statutorily implement the victims' rights amendment to article I, section 13 of the Indiana Constitution.¹ The new act also repealed and replaced the existing statutes regarding victim assistance programs and victim notification.² Under the new act, a victim is defined as a person who "has suffered harm as a result of a crime that was perpetrated directly against the person."³ A victim has the following rights: to be informed when a person is accused or convicted of the crime;⁴ to be notified of the convicted person's release or escape from custody;⁵ to confer with the prosecutor's office; and to be heard at a hearing involving sentence or post-conviction release of the convicted person.⁶ The act does not give the victim the authority to direct the prosecution,⁷ challenge a charging decision or a

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1. See IND. CODE § 35-40-1 (Supp. 1999). The amendment to the Indiana Constitution provides:

Victims of crime, as defined by law, shall have the right to be treated with fairness, dignity, and respect throughout the criminal justice process; and, as defined by law, to be informed of and present during public hearings and to confer with the prosecution, to the extent that exercising these rights does not infringe upon the constitutional rights of the accused.

IND. CONST. art. I, § 13(b).

2. See IND. CODE §§ 33-14-10; 35-33-12 (1997), *repealed by* Pub. L. 139-1999.

3. *Id.* § 35-40-4-8 (Supp. 1999).

4. See *id.* § 35-40-5-2(a).

5. See *id.* § 35-40-5-2(b).

6. See *id.* § 35-40-5-5.

7. See *id.* § 35-40-5-3.

conviction,⁸ obtain a stay of a trial,⁹ or obtain a new trial.¹⁰ The act is also not meant to give rise to a claim for damages against the State of Indiana, a political subdivision, or any public official.¹¹

B. New Criminal Offenses

The Indiana General Assembly created several new offenses that became effective in 1999.

1. *Domestic Battery*.—The legislature codified domestic battery as an independent battery offense,¹² and deleted references to domestic violence in the battery statute.¹³ A domestic battery occurs when the battery is directed at a person who “is or was a spouse of the other person,” “is or was living as if a spouse of the other person,” or “has a child in common with the other person” and the incident results in bodily injury.¹⁴ A domestic battery cannot occur unless the touching results in bodily injury.¹⁵ As with any other battery that results in bodily injury, domestic battery is a Class A misdemeanor.¹⁶ However, the offense is elevated to a Class D felony if the person has a previous, unrelated domestic battery conviction.¹⁷

A domestic battery conviction may also have ramifications for child visitation. Section 31-14-14-5 of the Indiana Code was amended to create a rebuttable presumption in favor of supervised visitation when the court finds that the noncustodial parent has been convicted of domestic battery that was witnessed or heard by the child.¹⁸ Following a conviction, supervised visitation will be required for at least one year but not more than two years or until the child is emancipated.¹⁹

2. *Cemetery Mischief*.—Cemetery mischief is defined as recklessly, knowingly, or intentionally damaging a cemetery or facility used for memorializing the dead; damaging the grounds owned or rented by a cemetery or facility used for memorializing the dead; or disturbing, defacing, or damaging a cemetery monument, grave marker, grave artifact, grave ornamentation, or cemetery enclosure.²⁰ The offense is a Class A misdemeanor, which is enhanced

8. *See id.* § 35-40-2-1(1).

9. *See id.*

10. *See id.*

11. *See id.* § 35-40-2-1.

12. *See id.* § 35-42-2-1.3.

13. *See id.* § 35-42-2-1.

14. *Id.* § 35-42-2-1.3.

15. *See id.*

16. *See id.*

17. *See id.*

18. *See id.* § 31-14-14-5.

19. *See id.*

20. *See id.* § 35-43-1-2.1.

to a Class D felony if the pecuniary loss is at least \$2500.²¹

3. *Railroad Mischief and Criminal Trespass.*—In addition to cemetery mischief, the legislature also created a railroad mischief offense defined as recklessly, knowingly or intentionally damaging or vandalizing various railroad equipment.²² The offense is a Class D felony enhanced to a Class C felony if the mischief results in serious bodily injury, or a Class B felony if it results in death.²³ Another railroad related offense was created when the criminal trespass statute was amended to include traveling by train without lawful authority or the railroad carrier's consent.²⁴

4. *Body Piercing.*—The legislature made it a Class A misdemeanor for a person to perform body piercing upon a person less than eighteen years of age absent the consent of a parent or guardian.²⁵ Body piercing is defined as "the perforation of any human body part other than an earlobe for the purpose of inserting jewelry or other decoration or for some other nonmedical purpose."²⁶ The law exempts health care professionals acting in the course of practice.²⁷

C. Enhancements to Previous Statutes

Several penalty enhancements became effective in 1999. The general assembly added a habitual sexual offender provision to the Indiana Criminal Code.²⁸ The provision permits the State to seek to have a person sentenced as a repeat sexual offender by alleging, on a separate charging instrument, that the person has accumulated one prior, unrelated felony conviction for a sexual offense.²⁹ The court may sentence a person found to be a repeat sexual offender to an additional fixed term equal to the presumptive sentence for the underlying offense, not to exceed ten years.³⁰

In response to an outbreak of church break-ins and fires in Indiana, the legislature amended the arson³¹ and burglary³² statutes to include religious structures among those buildings and structures listed in the respective statutes. The amendments elevated the arson and burglary of a religious structure to Class B felonies.³³

21. *See id.*

22. *See id.* § 35-42-2-5.5.

23. *See id.*

24. *See id.* § 35-43-2-2(a)(6)(A).

25. *See id.* § 35-42-2-7(c), -7(e).

26. *Id.* § 35-42-2-7(b).

27. *See id.* § 35-42-2-7(d).

28. *See id.* § 35-50-2-14.

29. *See id.* § 35-50-2-14(a).

30. *See id.* § 35-50-2-14(e).

31. *See id.* § 35-43-1-1(a)(4).

32. *See id.* § 35-43-2-1(1)(B)(ii).

33. *See id.* §§ 35-43-1-1(a)(4); 35-43-2-1(1)(B)(ii). Before the amendment, arson of a church would have been a Class D felony if the pecuniary loss was more than \$250 but less than

The legislature increased the penalty for neglect of a dependent from a Class D felony to a Class C felony if the neglect results in bodily injury or consists of cruel and unusual confinement or abandonment, or a Class B felony if the neglect results in serious bodily injury.³⁴ The general assembly also enhanced the penalty for trafficking with an inmate from a Class A misdemeanor to a Class C felony when the article delivered, carried, or received by the inmate is a controlled substance or a deadly weapon.³⁵ Finally, Indiana's sentencing statute was amended to include a person's employment at a penal facility as an aggravating circumstance when sentencing the person for drug trafficking.³⁶

D. Sex Offenders and Violent Offenders

The general assembly passed a provision requiring sex and violent offenders to register with local law enforcement authorities and prohibited a sex and violent offender who is on parole or probation from residing within 1000 feet of school property without the approval of the parole board or the court.³⁷ The general assembly also enacted a provision requiring the sex and violent offender registry be placed on the internet, but prohibited it from including the offender's home address.³⁸

II. CASE DEVELOPMENTS

A. Search and Seizure

The United States Supreme Court and Indiana's appellate courts decided several significant Fourth Amendment cases during the survey period. This section focuses on decisions relating to the rights of automobile passengers and drivers.

Two cases during the survey period addressed application of the Fourth Amendment to the search of a passenger's personal items found inside an automobile. In *Wyoming v. Houghton*,³⁹ a police officer performing a traffic stop noticed that the driver of the car had a syringe in his shirt pocket. The driver admitted to using the syringe to take drugs, giving the officer probable cause to search the car for contraband.⁴⁰ The officer ordered the driver and the two

\$5000 and a Class B felony if the loss was \$5000 or more. See IND. CODE § 35-43-1-1 (1998), amended by IND. CODE § 35-43-1-1(a)(4) (Supp. 1999). Burglary of a church would have been a Class C felony. See *id.* § 35-43-2-1, amended by IND. CODE § 35-43-2-1(1)(B)(ii) (Supp. 1999).

34. See *id.* § 35-46-1-4.

35. See *id.* § 35-44-3-9. Also, the drug trafficking statute was broadened to encompass juvenile facilities. See *id.*

36. See *id.* § 35-38-1-7.1(b)(13).

37. See *id.* §§ 11-13-3-4(g)(2); 35-38-2-2.2(2).

38. See *id.* § 5-2-12-11(b).

39. 526 U.S. 295 (1999).

40. See *Maryland v. Dyson* 527 U.S. 465 (1999); *United States v. Ross*, 456 U.S. 798

female passengers, including Houghton, out of the vehicle while he conducted a search. The officer discovered a purse in the back seat of the car that Houghton admitted belonged to her. Upon examining the purse, the officer discovered two containers that held syringes and illegal drugs.⁴¹ Houghton was convicted of drug possession.⁴² The Wyoming Supreme Court reversed the conviction, stating

Generally, once probable cause is established to search a vehicle, an officer is entitled to search all containers therein which may contain the object of the search. However, if the officer knows or should know that a container is the personal effect of a passenger who is not suspected of criminal activity, then the container is outside the scope of the search unless someone had the opportunity to conceal the contraband within the personal effect to avoid detection.⁴³

The Wyoming court held that the search of respondent's purse violated the Fourth and Fourteenth Amendments because the officer "[k]new or should have known that the purse did not belong to the driver, but to one of the passengers," and because "[t]here was no probable cause to search the passengers' personal effects and no reason to believe that contraband had been placed within the purse."⁴⁴

In a 6-3 opinion authored by Justice Scalia, the United States Supreme Court reversed the judgment of the Wyoming Supreme Court, holding that "police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search."⁴⁵ The Court reiterated its holding in *United States v. Ross* that "[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search."⁴⁶ The Court emphasized that its later cases describing *Ross* have characterized its holding as "applying broadly to all containers within a car, without qualification as to ownership."⁴⁷ Additionally, the Court found no historical evidence to support a distinction for searching packages based on ownership and concluded that the Fourth Amendment's balancing test tipped in favor of the government.⁴⁸ The Court further noted that a "passenger's property" exception to car searches

(1982); *Carroll v. United States*, 267 U.S. 132 (1925) (holding that police may conduct a warrantless search of an automobile where they have probable cause to believe the vehicle contains contraband). Similarly, in *Florida v. White*, 526 U.S. 559 (1999), the Court held that police do not need a warrant or exigent circumstances to publicly seize an automobile when they have probable cause to believe the automobile is forfeitable contraband under a state statute.

41. See *Houghton*, 526 U.S. at 298.

42. See *id.*

43. *Houghton v. State*, 956 P. 2d 363, 372 (Wyo. 1998), *rev'd*, 526 U.S. 295 (1999).

44. *Id.*

45. *Houghton*, 526 U.S. at 307.

46. *Id.* at 301 (quoting *United States v. Ross*, 456 U. S. 798, 825 (1982)).

47. *Id.*

48. See *id.* at 302-03.

would likely lead to passenger-confederates claiming everything in the car as their own, resulting in a "bog of litigation."⁴⁹

In *State v. Friedel*,⁵⁰ the Indiana Court of Appeals addressed the propriety of a similar search. In *Friedel*, police stopped a van to cite the driver, Ryan Underwood, for operating the vehicle with only one headlight. In addition to Underwood, the vehicle was occupied by Friedel and her child, and one or two male passengers.⁵¹ A computer check of the Underwood's criminal record revealed prior charges but no outstanding warrants. Police sought and received Underwood's permission to search the van for illegal drugs and weapons.⁵² All of the passengers then exited the van, and the police conducted a search. While searching the vehicle, police found a purse on the floor behind the driver's seat where Friedel had been sitting. Police searched the purse and discovered a leather wallet and an eyeglasses case, both of which contained illegal drugs.⁵³ After searching the purse, police asked Friedel if it belonged to her. Friedel acknowledged that it was her purse, and police arrested her. Friedel was subsequently charged with possession of a controlled substance and possession of marijuana.⁵⁴ Friedel filed a motion to suppress the drugs found in her purse. The trial court granted her motion, resulting in dismissal of the charges, and the State appealed.⁵⁵

In addressing the propriety of the search, the court of appeals first concluded that Friedel had standing to challenge the search of her purse, stating "the question is not whether Friedel had standing to challenge the search of Underwood's automobile, but rather whether she has standing to challenge the search of her purse which was in Underwood's automobile. . . . [A]s the owner of the purse . . . [Friedel] has standing to challenge the constitutionality of the search of her purse."⁵⁶

The court then addressed the State's claim that the search was permissible under *Wyoming v. Houghton*.⁵⁷ The court found *Houghton* inapplicable because, unlike the police in this case, the officers in *Houghton* had probable cause to conduct the search.⁵⁸ The search in this case was based solely on Underwood's consent to search the vehicle.⁵⁹ Thus, the court reasoned, the ultimate issue in this case was whether Underwood's consent to the search of his vehicle constituted consent to search Friedel's purse.⁶⁰

49. *Id.* at 305.

50. 714 N.E.2d 1231 (Ind. Ct. App. 1999).

51. *See id.* at 1234-35.

52. *See id.* at 1235.

53. *See id.*

54. *See id.*

55. *See id.*

56. *Id.* at 1236-37.

57. *See id.* at 1237-38.

58. *See id.* at 1238.

59. *See id.*

60. *See id.*

The court of appeals concluded that Underwood's consent did not extend to Friedel's purse.⁶¹ Citing the absence of evidence in the record showing Underwood jointly owned, possessed, or controlled the purse, the court found Underwood lacked actual authority to consent to a search of Friedel's purse.⁶² The court also determined that Underwood did not have apparent authority to consent to a search of Friedel's purse.⁶³ A search is valid under the apparent authority doctrine where the State can prove that the officers "reasonably believed that the person from whom they obtained consent had the actual authority to grant consent."⁶⁴ Noting that the purse was a woman's handbag, Friedel was the only woman in the car, and the purse was found where Friedel had been sitting, the court concluded that it was unreasonable for police to believe that Underwood had the authority to consent a search of the purse—"an object for which two or more persons [generally do not] share common use or authority."⁶⁵

In another case involving the rights of automobile passengers, the Indiana Court of Appeals held in *Walls v. State*⁶⁶ that the action of a passenger exiting and walking away from a vehicle that has been stopped by police for a minor traffic violation does not amount to reasonable suspicion to conduct an investigatory stop of that passenger. In *Walls*, a police officer stopped a car in a high drug-trafficking area after the driver made a left-hand turn without using his turn signal.⁶⁷ As the officer began to communicate his location and run a check of the car's license plate via police radio, Walls, a passenger, "jumped out of . . . the vehicle and shut the door and started to walk away."⁶⁸ The officer ordered Walls to stop and return and Walls complied. When asked if he had any weapons, Walls admitted that he had a knife in his pocket.⁶⁹ The officer conducted a pat-down search of Walls that produced two knives, one of which had crack-cocaine residue on the blade.⁷⁰ The State charged Walls with possession of cocaine.⁷¹ The trial court denied Walls' motion to suppress, and Walls was subsequently convicted as charged.⁷²

In a 2-1 decision, the court of appeals found there was a lack of specific evidence indicating that Walls posed a threat or had been engaging in or was

61. See *id.* at 1243.

62. See *id.* at 1240.

63. See *id.* at 1240-41.

64. *Id.* (quoting *United States v. Welch*, 4 F.3d 761, 764 (9th Cir. 1993)).

65. *Id.*

66. 714 N.E.2d 1266 (Ind. Ct. App. 1999), *trans. denied*, 726 N.E.2d 316 (Ind. 1999) (mem.).

67. See *id.*

68. *Id.* at 1267.

69. See *id.*

70. See *id.*

71. See *id.*

72. See *id.*

about to engage in criminal activity.⁷³ Thus, the officer had no basis to stop and pat-down Walls.⁷⁴ In the opinion authored by Judge, now Indiana Supreme Court Justice, Rucker, the court held that simply walking away from a stopped car in a high drug-trafficking area was not enough to create the suspicion which warranted detaining Walls.⁷⁵ The court also found that the need of law enforcement to control the scene of a traffic stop did not outweigh "[t]he liberty of a private citizen who has been observed engaging in no illegal activity, and whose only transgression is his untimely presence in a car that has been stopped for a minor traffic violation"⁷⁶ Judge Sullivan dissented from the majority decision, citing officer safety and cases from other jurisdictions that have found such stops permissible.⁷⁷

In *Knowles v. Iowa*,⁷⁸ the United States Supreme Court held that police may not conduct a search incident to the issuance of a traffic citation even when authorized by state law, and even when the officer could have made an arrest. Iowa law provides that Iowa peace officers having cause to believe that a person has violated any traffic or motor vehicle equipment law may arrest the person and immediately take the person before a magistrate.⁷⁹ Iowa law also authorizes the practice of issuing a citation in lieu of arrest or in lieu of continued custody after an initial arrest.⁸⁰ The Court found that the search in this case, as authorized by Iowa law, could not be sustained under the "search incident to arrest" exception recognized in *United States v. Robinson*.⁸¹ The Court found that the two historical rationales for the "search incident to arrest" exception announced in *Robinson*, the need to disarm the suspect in order to take him into custody, and the need to preserve evidence for later use at trial, were not at work in this case.⁸² Thus, the Court declined to extend *Robinson*'s bright line rule to the issuance of a citation.⁸³

73. See *id.* at 1268.

74. See *id.*

75. See *id.*

76. *Id.* Cf. *Webb v. State*, 714 N.E.2d 787 (Ind. Ct. App. 1999); *Stalling v. State*, 713 N.E.2d 922 (Ind. Ct. App. 1999) (both holding that a person who turns away from police in a high crime area and places an unknown item in his pants does not engage in suspicious activity that supports an investigatory stop).

77. See *Walls*, 714 N.E.2d at 1269 (Sullivan, J., dissenting). The continued vitality of *Walls* may be in question in light of the United States Supreme Court's recent decision in *Illinois v. Wardlow*, 120 S. Ct. 673 (2000), which held that running away from police in an area of heavy narcotics trafficking gives rise to reasonable suspicion for police to investigate further.

78. 525 U.S. 113 (1998).

79. See IOWA CODE § 321.485(1)(a) (Supp. 1997).

80. See *id.* § 805.1(1).

81. See *Knowles*, 525 U.S. at 116-19 (citing *United States v. Robinson*, 414 U. S. 218, 234 (1973)).

82. See *id.* (citing *Robinson*, 414 U. S. at 234).

83. See *id.* at 118-19.

In *Jett v. State*,⁸⁴ the Indiana Court of Appeals also held that absent specific facts indicating an individual is armed or dangerous, police may not search a person stopped for a traffic violation. Police stopped Jett for speeding and improper passing.⁸⁵ Immediately after being stopped, Jett exited his vehicle. The police officer ordered Jett back into his car. Jett complied and made no furtive or threatening movements.⁸⁶ The officer then approached Jett's car, ordered Jett out, and performed a pat-down search of Jett that produced marijuana. A subsequent search of Jett's car produced additional marijuana⁸⁷ and the State charged Jett with possession of marijuana. The trial court denied Jett's motion to suppress the drugs, and Jett was convicted as charged.⁸⁸

The court of appeals found the search was illegal and reversed.⁸⁹ The court noted that, although exiting a vehicle during a traffic stop may in some cases be a sign that the person is dangerous or a threat, in this case Jett did not behave in a threatening manner when he got out of his car.⁹⁰ The court also stated that any threat that may have existed was alleviated when Jett complied with the officer's order to return to his car.⁹¹ The court found that a generalized suspicion of all drivers who exit their vehicles during a traffic stop does not authorize a pat-down search.⁹²

B. Confessions

In *State v. Linck*,⁹³ the Indiana Court of Appeals addressed whether physical evidence obtained as a result of statements given during a custodial interrogation, where the State failed to advise the defendant of his *Miranda* rights,⁹⁴ should be suppressed as fruit of the poisonous tree. In *Linck*, two police officers responded to a report of drug use in Linck's apartment. As the officers entered Linck's apartment building they smelled what they believed to be burning marijuana.⁹⁵ The officers knocked on Linck's door, and after a few seconds, Linck answered and allowed the officers inside. The officers told Linck they smelled marijuana

84. 716 N.E.2d 69 (Ind. Ct. App. 1999).

85. *See id.* at 70.

86. *See id.*

87. *See id.*

88. *See id.*

89. *See id.* at 71.

90. *See id.* at 70.

91. *See id.*

92. *See id.* (citing *Knowles v. Iowa*, 525 U.S. 113, 119 (1998)).

93. 708 N.E.2d 60 (Ind. Ct. App.), *trans. granted*, 714 N.E.2d 175 (Ind.), *and trans. dismissed*, 716 N.E.2d 897 (Ind. 1999).

94. *See Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966) (holding that before a person may be subject to custodial interrogation, he must be warned that "[h]e has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him.").

95. *See Linck*, 708 N.E.2d at 61.

and believed he had been using illegal drugs. The officers then asked Linck, "what the problem was?"⁹⁶ A surprisingly candid Linck responded that he had "just smoked a joint."⁹⁷ The officers then asked Linck if there was any more marijuana in the apartment. Linck answered that there was and retrieved a bag containing 28.2 grams of marijuana from his refrigerator.⁹⁸ The officers asked if that was all. Linck responded that there was more marijuana in the bedroom, which the officers retrieved. During his exchange with police, Linck was never advised of his *Miranda* rights.⁹⁹ Linck was arrested and charged with possession of marijuana.¹⁰⁰ Linck filed a motion to suppress the marijuana and his statements arguing that they were unlawfully obtained because the officers failed to advise him of his *Miranda* rights prior to questioning him in his apartment.¹⁰¹ The trial court granted Linck's motion, resulting in the dismissal of the charge, and the State appealed.¹⁰²

"*Miranda* warnings are based upon the Fifth Amendment Self-Incrimination Clause, and were designed to protect an individual from being compelled to testify against himself."¹⁰³ The *Miranda* safeguards apply only when a person is subject to custodial interrogation.¹⁰⁴ An interrogation includes words or actions on the part of police "that the police should know are reasonably likely to elicit an incriminating response from the suspect."¹⁰⁵ A person is in custody in situations where a reasonable person would not feel free to leave.¹⁰⁶ In this case, the court of appeals determined that Linck was being subjected to a custodial interrogation when the officers questioned him regarding the existence of additional marijuana after Linck stated that he had "just smoked a joint."¹⁰⁷ Thus, the court held that officers violated *Miranda* when they failed to advise Linck of his rights before questioning him and upheld the trial court's suppression of Linck's statements.¹⁰⁸

The court then addressed whether the *Miranda* violation required suppression of the physical evidence seized as a result of Linck's statements under the fruit of the poisonous tree doctrine.¹⁰⁹ The State argued that the fruit of the poisonous tree doctrine applies only to evidence seized following a constitutional violation and not a mere violation of *Miranda*'s prophylactic

96. *Id.*

97. *Id.*

98. *See id.* at 61-62.

99. *See id.*

100. *See id.*

101. *See id.*

102. *See id.* at 62.

103. *Id.* (citing *Curry v. State*, 643 N.E.2d 963, 976 (Ind. Ct. App. 1994)).

104. *See id.* (citing *Curry*, 643 N.E.2d at 976).

105. *Id.* (citing *Curry*, 643 N.E.2d at 977).

106. *See id.*

107. *Id.* at 62-63.

108. *See id.* at 63.

109. *See id.* at 63-66.

procedures; therefore, because Linck's confession was not the result of a constitutional violation, the physical evidence should not have been suppressed.¹¹⁰ The court of appeals observed that several circuits of the United States Courts of Appeals that had addressed the issue had concluded that physical evidence derived from a statement obtained in violation of *Miranda* is admissible absent evidence of coercion or other misconduct on the part of law enforcement officers sufficiently egregious to offend due process.¹¹¹ The court then noted that although the United States Supreme Court had not yet directly addressed the issue, most of the appellate court decisions cited *Oregon v. Elstad*¹¹² in support of their decisions.¹¹³ In *Elstad*, the Court determined that a defendant's initial statements made without *Miranda* warnings at the defendant's home did not render a subsequent written confession inadmissible.¹¹⁴ The Court found that because the defendant's initial statement was not coerced so as to violate the Fifth Amendment, the exclusionary rule did not require the subsequent written confession to be suppressed.¹¹⁵ The *Elstad* Court noted that the fruit of the poisonous tree doctrine prevents the State from offering evidence that has been tainted by a constitutional violation, and that *Miranda* warnings are not themselves rights protected by the Constitution.¹¹⁶ Thus, the Court reasoned that a violation of *Miranda* may occur even in the absence of a Fifth Amendment violation.¹¹⁷

While the Indiana Court of Appeals found *Elstad* to be persuasive authority, it reiterated that the United States Supreme Court had yet to directly address the issue presented in this case—the suppression of physical evidence obtained in violation of *Miranda*.¹¹⁸

The court then looked to *Hall v. State*,¹¹⁹ a pre-*Elstad* decision of the Indiana Supreme Court which specifically held that when a confession is unlawfully obtained, evidence which is inextricably bound to the confession must be suppressed.¹²⁰ The court recognized that *Hall* did not discuss the distinction between a *Miranda* violation and a violation of the Fifth Amendment right against self-incrimination, and stated that *Hall*'s validity may be in question.¹²¹ Nevertheless, the court of appeals held that it was bound by the decision of

110. See *id.* at 63-64.

111. See *id.* at 64 (citing *United States v. Elie*, 111 F.3d 1135 (4th Cir. 1997); *United States v. Crowder*, 62 F.3d 782, 786 (6th Cir. 1995); *United States v. Mendez*, 27 F.3d 126, 130 (5th Cir. 1994); *United States v. Gonzalez-Sandoval*, 894 F.2d 1043 (9th Cir. 1990)).

112. 470 U.S. 298 (1985).

113. See *Linck*, 708 N.E.2d at 64.

114. See *Elstad*, 470 U.S. at 318.

115. See *id.*

116. See *id.* at 305-06.

117. See *id.* at 306-07.

118. See *Linck*, 708 N.E.2d at 65.

119. 346 N.E.2d 584 (Ind. 1976).

120. See *Linck*, 708 N.E.2d at 66.

121. See *id.*

Indiana's highest court and affirmed the suppression of the marijuana recovered from Linck's apartment.¹²²

The State sought transfer to the Indiana Supreme Court.¹²³ After granting transfer and hearing oral argument, the supreme court set aside the order granting transfer and left the court of appeals' decision undisturbed.¹²⁴

In *A.A. v. State*,¹²⁵ the Indiana Court of Appeals held that a juvenile's noncustodial confession was obtained in violation of the Fourteenth Amendment's Due Process Clause. In this case, J.D. reported to police that his cousin, fifteen-year-old A.A., had placed his mouth on J.D.'s penis. A.A. and his mother voluntarily met twice with a detective to discuss the allegation. On both occasions, the detective informed A.A. and his mother that they were free to leave at any time.¹²⁶ During the first interview, A.A. told the detective that he had been molested over a five year period by his uncle, J.D.'s father. When A.A. returned for a second interview, the detective told A.A. that he would not be a credible witness in the State's molestation case against his uncle unless he confessed to what had occurred between him and J.D.¹²⁷ A.A. then confessed to performing oral sex on J.D.¹²⁸

Thereafter, the State brought delinquency proceedings against A.A.¹²⁹ At the fact-finding hearing, J.D. recanted the earlier allegation he made to police. The trial court did not permit the State to admit J.D.'s prior statement as substantive evidence.¹³⁰ The State then sought to introduce A.A.'s written confession. A.A.'s counsel objected, arguing that the detective coerced A.A. into confessing when she improperly used A.A.'s molestation allegations against his uncle to secure the confession.¹³¹ The trial court overruled the objection, admitted the confession, and subsequently adjudicated A.A. as a delinquent child.¹³² A.A. appealed.¹³³

The court of appeals first noted that when A.A. and his mother met with the detective, A.A. was free to leave and thus not subject to a custodial interrogation.¹³⁴ Therefore, the court concluded that neither the *Miranda* warnings nor the juvenile waiver statute¹³⁵ were implicated.¹³⁶ The court then

122. *See id.*

123. *See State v. Linck*, 714 N.E.2d 175 (Ind. 1999).

124. *See State v. Linck*, 716 N.E.2d 897 (Ind. 1999).

125. 706 N.E.2d 259 (Ind. Ct. App. 1999).

126. *See id.* at 260-61.

127. *See id.* at 261.

128. *See id.*

129. *See id.*

130. *See id.*

131. *See id.*

132. *See id.*

133. *See id.*

134. *See id.* at 262.

135. *See* IND. CODE § 31-32-5-1 (1998).

136. *See A.A.*, 706 N.E.2d at 262.

addressed A.A.'s claim under the Due Process Clause of the Fourteenth Amendment. The court looked at the totality of the circumstances in which A.A. gave his confession to determine whether it was "the product of rational intellect," freely given, and not the result of improper interrogation tactics.¹³⁷ The court found the detective's "ultimatum" that A.A. must confess before his claims against his uncle would be taken seriously constituted police pressure amounting to an improper *quid pro quo* that rendered the confession involuntary.¹³⁸ The court stated:

[O]nly if A.A. confessed to a single incident of child molesting which occurred between him and another child would the State prosecute his uncle, an adult, who had allegedly victimized and sexually abused him over a five-year period. . . . Given the totality of the circumstances, we conclude that A.A.'s confession was not voluntary, that the police conduct in this case violates the Due Process Clause of the Fourteenth Amendment, and that the trial court erred when it admitted the confession into evidence.¹³⁹

The court of appeals reversed A.A.'s adjudication.¹⁴⁰

Although A.A. may cause police to rethink their use of *quid pro quo* bartering as an interrogation technique, the fact that A.A. was a juvenile and not represented by counsel may have been the key determinants in this case and thus AA will likely be limited to its specific facts.

C. Grand Jury

Grand jury proceedings are optional in Indiana.¹⁴¹ According to statute, and consistent with the federal and state constitutions, "Any crime may be charged by indictment or information."¹⁴² Not surprisingly, in the vast majority of cases¹⁴³ prosecutors elect the much easier procedure of charging by information rather than pursuing an indictment. "Nevertheless, when prosecutors elect to pursue an indictment before a grand jury, they must comply with the requirement of due process and the statutory requirements governing grand jury proceedings."¹⁴⁴ According to the United States Supreme Court, "[t]he fact that there is no constitutional requirement that States institute prosecutions by means of an indictment returned by a grand jury does not relieve those States that do employ grand juries from complying with the commands of the Fourteenth

137. *Id.*

138. *Id.* at 264.

139. *Id.*

140. *See id.* at 265.

141. *See* IND. CODE § 35-34-1-1(a) (1998).

142. *Id.*

143. *See generally* WAYNER, LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 15.1(c), at 617 (1985).

144. *Wurster v. State*, 715 N.E.2d 341, 345 (Ind. 1999).

Amendment in the operation of those juries.”¹⁴⁵

In *Wurster v. State*,¹⁴⁶ the supreme court granted transfer to consider the propriety of a somewhat unusual grand jury procedure. In *Wurster*, after the prosecutor questioned a witness, the witness waited outside the jury room and the grand jurors then presented their questions to the prosecutor who posed the questions after the witness returned to the grand jury room.¹⁴⁷ No record was made of the conversations between the prosecutor and the grand jurors.¹⁴⁸ This procedure was challenged on appeal on two grounds: (1) grand jurors were not permitted to ask direct questions of the witnesses and (2) the absence of a record of the conversations between the prosecutor and grand jury about the questions to be asked.¹⁴⁹ The procedure was alleged to violate both the Due Process Clause of the Constitution and Indiana’s grand jury statute.¹⁵⁰

The supreme court held that neither claim presented a violation of the Due Process Clause as prosecutorial misconduct.¹⁵¹ Such a violation requires a showing that there was a “flagrant imposition of the grand jurors’ will or independent judgment.”¹⁵² The supreme court found no flagrant imposition and observed “because there was no record kept, we can only speculate as to the degree, if any, of imposition of will or impairment of independent judgment that occurred.”¹⁵³

However, the court reached a different conclusion in regard to the alleged statutory violation.¹⁵⁴ The supreme court observed that no statutory provision directly addresses the ability of grand jurors to question witnesses directly, but concluded that the combination of the grand jury statute, the decisional law interpreting it, and the “usual practice” in Indiana of required direct questioning by grand jurors.¹⁵⁵ However, the court observed that not every statutory violation is cause for dismissal of an indictment.¹⁵⁶ Because of the fact that there was no record of the exchanges between the prosecutor and the grand jurors, the court held in regard to the indirect questioning procedure, the defendant failed to make the required showing of prejudice required for dismissal of the indictment.¹⁵⁷

Finally, the supreme court also addressed the application of Indiana Code section 35-34-2-3(d), which provides in part:

145. *Rose v. Mitchell*, 443 U.S. 545, 557 n.7 (1979) (citation omitted).

146. 715 N.E.2d 341 (Ind. 1999).

147. *See id.* at 344.

148. *See id.*

149. *See id.*

150. *See* IND. CODE § 35-34-2 (1998).

151. *See Wurster*, 715 N.E.2d at 345.

152. *Id.* (quoting *Wurster v. State*, 708 N.E.2d 587, 592 (Ind. Ct. App.), *aff’d*, 715 N.E.2d 341 (Ind. 1999)).

153. *Id.*

154. *See id.* at 346.

155. *Id.*

156. *See id.*

157. *See id.*

The court shall supply a means for recording the evidence presented before the grand jury and all of the other proceedings that occur before the grand jury, except for the deliberations and voting of the grand jury and other discussions when the members of the grand jury are the only persons present in the grand jury room. The evidence and proceedings shall be recorded in the same manner as evidence and proceedings are recorded in the court that impaneled the grand jury. . . .¹⁵⁸

Unlike the violations of other statutory provisions, the supreme court held that the failure to record the exchanges between the prosecutor and grand jurors did not require a showing of prejudice in order to warrant dismissal of the indictment.¹⁵⁹ As the court put it, “the error itself renders it impossible for a reviewing court to evaluate what, if any, interference with or domination of the grand jurors occurred.”¹⁶⁰ However, because the defendant did not allege a violation of the statutory provision requiring recording of the proceedings in the trial court, the supreme court held that this new argument raised for the first time in the petition for transfer did not warrant reversal of the trial court.¹⁶¹

D. Non-mutual Collateral Estoppel

In *Jennings v. State*, the Indiana Court of Appeals applied the doctrine of non-mutual collateral estoppel in a criminal proceeding.¹⁶² Though not hailed as a case of first impression, it appears to be the first time an Indiana appellate court has held that the doctrine is applicable in the criminal context.

Collateral estoppel acts to bar relitigation of a claim or issue in a subsequent proceeding between the same parties.¹⁶³ In determining whether to apply collateral estoppel, the court must determine what issue or fact was decided by the first judgment and how that determination bears on the subsequent action.¹⁶⁴ In 1992, the Indiana Supreme Court sanctioned the use of non-mutual collateral estoppel in *Sullivan v. American Casualty Co.*,¹⁶⁵ holding that collateral estoppel no longer required that the party seeking to take advantage of the prior adjudication would have been bound had the prior judgment been decided differently (mutuality of estoppel), or that the party who is to be bound by the prior adjudication be the same as or in privity with the party in the prior action (identity of parties).¹⁶⁶ A stranger to a prior action may seek to invoke the collateral estoppel doctrine; therefore, it is referred to as non-mutual collateral

158. IND. CODE § 35-34-2-3(d) (1998).
159. *See id.*
160. *Id.* at 347.
161. *See id.* at 347-48.
162. 714 N.E.2d 730 (Ind. Ct. App.), *trans. denied*, 726 N.E.2d 306 (Ind. 1999) (mem.).
163. *See generally* Smith v. State, 670 N.E.2d 360, 362 (Ind. Ct. App. 1996).
164. *See id.*
165. 605 N.E.2d 134 (Ind. 1992).
166. *See id.* at 137.

estoppel. Although the court in *Sullivan* did not expressly limit its holding to civil cases, the use of collateral estoppel in the criminal context has generally been considered a part of the prohibition against double jeopardy and thus, involved an earlier prosecution of the same defendant by the same governmental entity.¹⁶⁷

In *Jennings*, the defendant and two passengers, Tina Lehr and Chad Pryor, were stopped by police in Jennings' car.¹⁶⁸ When Jennings got out of the car to show the officer his identification, the officer noticed a small knife in the car.¹⁶⁹ The officer asked Lehr and Pryor to exit the car so he could check for weapons. As Lehr got out of the car, she removed a plastic bag containing illegal drugs from her purse and hid it behind her back. When questioned by the officer, she said the bag belonged to Jennings.¹⁷⁰ The officer then requested and received permission to search Jennings and his car. However, the search of the car was not conducted at the scene. Instead, the car was towed to the police department where subsequent searches produced other illegal drugs.¹⁷¹

The State filed drug charges against Pryor in the Warrick Superior Court I. Pryor filed a motion to suppress the drugs¹⁷² which was granted after the superior court concluded that the officer had conducted an illegal search of Lehr's purse and consequently suppressed all evidence found in Jennings' car as the fruit of the poisonous tree.¹⁷³

The State filed charges against Jennings in the Warrick Circuit Court.¹⁷⁴ Jennings also filed a motion to suppress the drugs, invoking non-mutual collateral estoppel. Jennings argued that because the Warrick Superior Court in Pryor's case had previously determined that searches of Lehr's purse and the car were improper, the State was then estopped from relying on the searches and seized evidence in Jennings' case.¹⁷⁵ The trial court denied Jennings' motion, and the court of appeals reversed.¹⁷⁶

The court's decision to apply non-mutual collateral estoppel in the criminal context appears to be the minority position. Other jurisdictions that have considered this issue have declined to apply non-mutual collateral estoppel against a governmental entity in criminal cases.¹⁷⁷ Most jurisdictions that reject application of the doctrine in criminal cases cite the reasoning of the United

167. See, e.g., *Davis v. State*, 691 N.E.2d 1285, 1288 (Ind. Ct. App. 1998).

168. See *Jennings v. State*, 714 N.E.2d 730, 732 (Ind. Ct. App.), *trans. denied*, 726 N.E.2d 306 (Ind. 1999) (mem.).

169. See *id.*

170. See *id.*

171. See *id.*

172. See *id.*

173. See *id.* at 733.

174. See *id.*

175. See *id.* at 732.

176. See *id.* at 733-35.

177. See 50 C.J.S. *Judgments* § 919(b) (1997); 47 AM. JUR. 2D *Judgments* § 649 (1995).

States Supreme Court in *Standefer v. United States*.¹⁷⁸ In *Standefer*, the Court held that non-mutual collateral estoppel was not applicable in criminal cases to preclude the prosecution of an accomplice where a jury had already acquitted the principal.¹⁷⁹ The Court reasoned that several aspects of criminal law prevent the government from having a full and fair opportunity to litigate an issue, such as: the prosecution's limited discovery rights; the prohibition against a directed verdict for the prosecution no matter how clear the evidence in favor of guilt; and the prosecution's prohibition against seeking a new trial or appealing an acquittal.¹⁸⁰ The Court also found that application of non-mutual collateral estoppel is complicated by the rules of evidence and exclusion unique to criminal law, noting that the exclusionary rule may prohibit the government from introducing evidence against one defendant, but the same evidence may be admissible against another defendant whose Fourth Amendment rights were not implicated.¹⁸¹ Four months after *Jennings* was decided, another panel of the court of appeals, citing the reasoning in *Standefer*, held in *Reid v. State*,¹⁸² that non-mutual collateral estoppel should not apply in criminal cases.¹⁸³ The *Reid* decision was authored by then Judge Rucker.

It is worthy of note that the *Jennings* court declined to address the State's assertion that Jennings did not have standing to challenge the search of Lehr's purse.¹⁸⁴ In a footnote, the court stated that it was limiting its decision to application of the principles of collateral estoppel.¹⁸⁵ However, it seems that determining whether the Superior and Circuit courts were truly deciding the same issue would necessarily involve a determination of the defendants' standing to challenge the search. Fourth Amendment rights are personal in nature, and as the *Standefer* court observed, the same search may violate one person's rights yet not impinge upon another's.¹⁸⁶

E. Belated Addition of Habitual Offender Charge

Two panels of the Indiana Court of Appeals reached different conclusions when asked to determine whether a defendant must seek a continuance to preserve for appeal an alleged improper addition of an habitual offender charge

178. 447 U.S. 10 (1980).

179. *See id.* at 24.

180. *See id.* at 22-23. The State in *Jennings* conceded at trial that it had a full and fair opportunity to litigate the issue in Pryor's case. *See Jennings*, 714 N.E.2d at 734.

181. *See Standefer*, 477 U.S. at 23-24.

182. 719 N.E.2d 451 (Ind. Ct. App. 1999).

183. *See id.* at 456.

184. The court's decision also did not indicate how the Superior Court determined that the search of Lehr's purse infringed upon Pryor's right to be free from unreasonable search and seizure.

185. *See Jennings*, 714 N.E.2d at 734 n.3.

186. *See, e.g., Rakas v. Illinois*, 439 U.S. 128 (1978) (stating that a person must have a legitimate expectation of privacy in the place searched before their Fourth Amendment rights attach).

under section 35-34-1-5(e) of the Indiana Code. In *Attebury v. State*¹⁸⁷ and *Mitchell v. State*,¹⁸⁸ the defendants alleged on appeal that the trial court erred when it allowed the State to add an habitual offender charge more than ten days after the omnibus date.¹⁸⁹ The State argued in both cases that the defendants waived the issue for appeal by failing to seek a continuance after the trial court permitted the amendment.¹⁹⁰ The *Mitchell* court held that the defendant had waived the issue;¹⁹¹ the *Attebury* court held otherwise.¹⁹² The disagreement centers around the interpretation of language from the Indiana Supreme Court's decision in *Haymaker v. State*.¹⁹³

In *Haymaker*, the State sought to amend a habitual offender charge, substituting a confinement conviction for a possession of marijuana conviction.¹⁹⁴ On appeal, the defendant claimed that the amendment was outside the time period permitted by section 35-41-1-5(e) of the Indiana Code which provides:

An amendment of an indictment or information to include a habitual offender charge under IC 35-50-2-8 must be made not later than ten (10) days after the omnibus date. However, upon a showing of good cause, the court may permit the filing of a habitual offender charge at any time before the commencement of the trial.¹⁹⁵

The Indiana Supreme Court held that section 35-34-1-5(e) of the Indiana Code did not apply when the State merely amended an already existing habitual offender count.¹⁹⁶ Rather, the court found that section 35-34-1-5(c) controls in situations where the State seeks to amend, and not add, a habitual offender count.¹⁹⁷ Subsection (c) permits the State to amend an information at any time as long as the amendment does not prejudice the defendant's substantial rights.¹⁹⁸ After finding that the defendant failed to show prejudice, the court in *Haymaker* stated, "[E]ven if § 35-34-1-5(e) were to apply, defendant has waived the issue for appeal. Once defendant's objection [to the amendment] had been overruled, he should have requested a continuance"¹⁹⁹

Judge Robb, writing for the majority in *Attebury*, found the above quoted language from *Haymaker* to mean "if section 35-34-1-5(e) were to apply to *amending* habitual offender counts, a continuance must be requested to preserve

187. 703 N.E.2d 175 (Ind. Ct. App. 1998).

188. 712 N.E.2d 1050 (Ind. Ct. App. 1999).

189. See *Mitchell*, 712 N.E.2d at 1052; *Attebury*, 703 N.E.2d at 176.

190. See *Mitchell*, 712 N.E.2d at 1053; *Attebury*, 703 N.E.2d at 179.

191. See *Mitchell*, 712 N.E.2d at 1052-53.

192. See *Attebury*, 703 N.E.2d at 179-80.

193. 667 N.E.2d 1113 (Ind. 1996).

194. See *id.* at 1113.

195. IND. CODE § 35-41-5(e) (1998).

196. See *Haymaker*, 667 N.E.2d at 1114.

197. See *id.*

198. See IND. CODE § 35-41-5(c).

199. *Haymaker*, 667 N.E.2d at 1114.

the error, as the defendant must show that his rights have been prejudiced by the amendment. In this situation [where the amendment *added* the habitual offender charge], we do not believe it necessary."²⁰⁰ Judge Robb reasoned that a continuance is an inadequate remedy when the State seeks to add an entirely new habitual offender count at the last minute because such an addition could significantly alter the defense's strategy, not only as to the habitual count, but also as to the substantive counts.²⁰¹ Judge Robb found that the same considerations do not apply to an amendment of an already existing habitual offender charge.²⁰² Judge Staton concurred in Judge Robb's opinion.²⁰³

Judge Kirsch dissented, concluding that the defendant had waived the issue.²⁰⁴ Judge Kirsch believed that in *Haymaker* the supreme court rejected any distinction between an amendment under section 35-34-1-5(c) of the Indiana Code and an addition of a new habitual count under subsection (e) for purposes of requesting a continuance to preserve the error.²⁰⁵

In *Mitchell*,²⁰⁶ Judge Najam, writing for a unanimous panel that included Judge Kirsch and Judge Garrard, found that *Attebury* "misinterpreted" the Indiana Supreme Court's ruling in *Haymaker* and held that "once the trial court allows either an amendment to the habitual offender charge under subsection (c), or the addition of an habitual offender charge under subsection (e), the defendant must seek a continuance to preserve the alleged error for appeal."²⁰⁷

F. Speedy Trial

The supreme court and court of appeals decided several cases during the survey period addressing a defendant's right to a speedy trial. This right is guaranteed by both the Sixth Amendment to the United States Constitution and article I, section 12 of the Indiana Constitution.²⁰⁸ Few defendants raise a claim that these constitutional provisions have been violated;²⁰⁹ rather, they contend that their right to a speedy trial under Rule 4 of the Indiana Rules of Criminal

200. *Attebury v. State*, 703 N.E.2d 175, 180 (Ind. Ct. App. 1998) (emphasis added).

201. *See id.*

202. *See id.*

203. *See id.* at 175.

204. *See id.* at 181 (Kirsch, J., dissenting).

205. *See id.*

206. *Mitchell v. State*, 712 N.E.2d 1050 (Ind. Ct. App. 1999).

207. *Id.* at 1053.

208. *See Wooley v. State*, 716 N.E.2d 919, 923 & n.2 (Ind. 1999).

209. *See id.* But see *Sauerheber v. State*, 698 N.E.2d 796, 805 (Ind. 1998) (raising solely a Sixth Amendment claim). As explained in *Sauerheber*, an alleged violation of the Sixth Amendment requires a defendant to meet the somewhat demanding four factor test set forth by the United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 530 (1972). That test requires a court to balance "the length of the delay, the reason of the delay, the defendant's assertion of his right, and the prejudice to the defendant." *Sauerheber*, 698 N.E.2d at 805 (citing *Barker*, 407 U.S. at 530).

Procedure was violated. Criminal Rule 4 sets forth time limitations that must be met to protect the state constitutional right to a speedy trial.²¹⁰ Criminal Rule 4(A) provides that a defendant may not be detained in jail awaiting trial for more than six months unless the delay was caused by the defendant's motion or act or court congestion.²¹¹ Any defendant so detained is entitled to be released on his own recognizance.²¹² Rule 4(B) provides that a defendant held in jail awaiting trial is entitled to discharge if not brought to trial within seventy calendar days of his motion for a speedy trial.²¹³ Any delay caused by the defendant's act or court congestion is excluded from the seventy-day time period.²¹⁴ Finally, Criminal Rule 4(C), which applies to those defendants who have not requested a speedy trial pursuant to Rule 4(B), provides that they shall be entitled to discharge if not brought to trial within one year of their arrest or the filing of charges against them, whichever is later.²¹⁵ Again, delay caused by a defendant's act or court congestion is excluded from the one-year time period.²¹⁶ Although Criminal Rule 4 does not require a defendant to "push the matter to trial," a defendant whose trial is set outside the specified periods must object to the setting "at the earliest opportunity or be deemed to have waived his right to discharge under the rule."²¹⁷

In *Diederich v. State*,²¹⁸ the supreme court granted transfer to address the requirement that a defendant move for discharge "at the earliest opportunity" in

210. See *Wooley*, 716 N.E.2d at 923.

211. See IND. R. CRIM. P. 4(A).

212. See *id.*

213. See IND. R. CRIM. P. 4(B)(1). As the court of appeals reiterated in *State v. Kent*, 700 N.E.2d 1187 (Ind. Ct. App. 1998), "Only a defendant who is imprisoned on a pending charge may make a Crim. R. 4(B) motion. The fact that Kent may have been in jail for an unrelated conviction has no bearing on the present case because there is no evidence that he was in jail at the time he filed his Crim. R. 4(B) motion." *Id.* at 1188 (citation omitted).

214. See IND. R. CRIM. P. 4(B)(1).

215. See IND. R. CRIM. P. 4(C). If a summons is issued in lieu of an arrest warrant, the speedy trial clock of Criminal Rule 4(C) starts on the day the summons orders the defendant to appear in court. See *Johnson v. State*, 708 N.E.2d 912, 915 (Ind. Ct. App.), *trans. denied*, 714 N.E.2d 177 (Ind. 1999).

216. See IND. R. CRIM. P. 4(C).

217. *Diederich v. State*, 702 N.E.2d 1074, 1075 (Ind. 1998) (citation omitted); see also *Ford v. State*, 706 N.E.2d 265, 267 (Ind. Ct. App.) ("The [trial] court's entry indicates that, far from objecting to the resetting of trial to [a date beyond the one-year period under Rule 4(C)], Ford agreed that trial should be reset for that date. The record reflects that Ford never filed a motion for discharge on Crim. R. 4(C) grounds. Therefore, the issue is waived.") (emphasis added), *trans. denied*, 714 N.E.2d 173 (Ind. 1999). But cf. *Schwartz v. State*, 708 N.E.2d 34, 36 (Ind. Ct. App. 1999) ("However, 'a defendant has no duty to object to the setting of a belated trial when the setting of the date occurs after the time expires such that the court cannot reset the trial date within the time allotted by Crim. R. 4(C). All the defendant needs to do then is move for discharge.'" (quoting *Pearson v. State*, 619 N.E.2d 590, 592 (Ind. Ct. App. 1993))).

218. 702 N.E.2d 1074 (Ind. 1998).

order to avoid waiver of his speedy trial right under Criminal Rule 4(C). In *Diederich*, charges had been pending against the defendant for almost a year when the trial court set the trial for six months later.²¹⁹ The trial court sent notice by mail to defense counsel, who filed a written objection, sent by first-class mail a few days later. Diederich later moved for discharge, and the trial court denied the motion on the basis that because the one-year period was close at hand, his objection sent by first-class mail did not constitute an objection "at the earliest opportunity, such as by fax machine, telephone, or hand delivery."²²⁰ A divided panel of the court appeals affirmed in an unpublished opinion, reasoning that "Diederich could have informed the court of his objection to the trial date in a more timely manner by use of fax or telephone."²²¹

The supreme court disagreed and ordered the defendant discharged.²²² Although there was little time left to conduct a trial at the time of Diederich's objection, "[T]he real reason for the shortness of time was not the defendant's use of the U.S. Mail but the prosecutor's decision much earlier in the game to let the matter pend in another court for 215 days before dismissing without prejudice."²²³

In *Havvard v. State*,²²⁴ the court of appeals considered whether a last-minute waiver of jury trial constituted delay attributable to the defendant under Criminal Rule 4(C). Havvard was charged with three offenses in July 1996, and in September the trial court set his case for jury trial in May 1997. At a pretrial conference on the day before the jury trial was scheduled, Havvard filed a waiver of the jury trial but did not request a continuance.²²⁵ The trial court accepted the waiver and set the case for a bench trial in December 1997. In June, Havvard moved for discharge, and the motion was denied. Havvard again moved for discharge immediately before the December bench trial.²²⁶ The trial court denied the motion for discharge on the basis that "if you ask for a jury and the day comes for a jury and you waive a jury all of those days are attributable to you."²²⁷ The trial court charged Havvard with 225 days of delay, from his September 1996 request for a jury trial until his May 1997 waiver.²²⁸

The court of appeals disagreed, and ordered Havvard discharged.²²⁹ It reasoned that Havvard's "last minute waiver of a jury trial did not mean that the trial court could not try him as scheduled. It would merely have been a bench

219. *See id.* at 1075.

220. *Id.* (quotation omitted).

221. *Id.* (quoting *Diederich v. State*, 699 N.E.2d 799 (Ind. Ct. App. 1998), *vacated*, 702 N.E.2d 1074 (Ind. 1999)).

222. *See id.*

223. *Id.*

224. 703 N.E.2d 1118 (Ind. Ct. App. 1999).

225. *See id.* at 1119.

226. *See id.*

227. *Id.* at 1120 (citation omitted).

228. *See id.*

229. *See id.* at 1121.

trial rather than a jury trial.”²³⁰ Because the trial court gave no reason for not holding a bench trial on the day of the scheduled jury trial, the court of appeals concluded that the silent record prevented attributing the reason for delay to Havvard.²³¹ Judge Staton dissented, pointing out in part:

[T]rial courts often schedule alternate jury trials for the same date, anticipating that some may be pled out or waived. Alternate trial scheduling decreases the chance that a jury panel will be called for naught. Proceeding with a bench trial when a jury panel has already been told to appear would waste judicial resources.²³²

Finally, in *McKay v. State*,²³³ the court of appeals addressed the difficulty of reconciling a congested court calendar with a defendant’s right to a speedy trial under Criminal Rule 4(B). McKay and two other men were charged with robbery and related charges on April 28, 1998.²³⁴ McKay moved for a speedy trial pursuant to Criminal Rule 4(B) on June 5, and a jury trial was scheduled for all three defendants on July 27. At a pretrial conference on July 22, the trial court explained that an “older” case was set for trial on July 27 and there was a “[p]ossibility that [McKay’s] case is going to get moved because only one case can be tried.”²³⁵ McKay’s case was continued on July 27 because of a congested calendar. The trial court’s order listed the reason for congestion as “*State v. Smith & Braeziel*,” which was the “first choice case” on that day.²³⁶ McKay’s trial was continued for two months. On July 28, McKay filed an objection to the continuance, stating that the court did not hear another trial on July 27; the September trial date was beyond the seventy-day period of Criminal Rule 4(B); and counsel was unavailable on the September trial date due to a previously scheduled trial.²³⁷ The trial court advanced McKay’s trial date to August 24; however, the seventy-day period expired on August 14.²³⁸ The August 24 trial was continued due to a court congestion order dated August 21, which cited the jury trial of *State v. Jackson*, the “first choice case” for August 24, as the reason for the continuance.²³⁹ The court reset McKay’s trial for October 5. On September 4, McKay moved for discharge, asserting that the delays in his case were not due to court congestion because no other trials were held on either July 27 or August 24.²⁴⁰ He also objected to the October 5 setting. The motion for

230. *Id.*

231. *See id.*

232. *Id.* at 1122 (Staton, J., dissenting).

233. 714 N.E.2d 1182 (Ind. Ct. App. 1999).

234. *See id.* at 1184.

235. *Id.* (citation omitted).

236. *Id.*

237. *See id.* at 1184-85.

238. *See id.* at 1185.

239. *Id.*

240. *See id.*

discharge was denied.²⁴¹ In response to a motion to reconsider, the trial court held a hearing on October 2.²⁴² At that hearing, one of the court's bailiffs testified that no case had gone to trial on either July 27 or August 24 and none of the defendants in the cases for which McKay's trial was continued had moved for a speedy trial.²⁴³ In denying McKay's motion, the trial court observed that "the record adequately establishes that we had other matters that were older matters that were before this court. . . . We have done everything we can to make sure these cases get tried as quickly as we possibly can considering the court's calendar."²⁴⁴ Later that day, McKay's trial was again continued due to a congested calendar. The court reset the trial for November 16. McKay filed a petition for a writ of habeas corpus on November 4, which the trial court denied on November 10, and the court of appeals accepted jurisdiction of that ruling as an interlocutory appeal on November 13.²⁴⁵

The court of appeals affirmed the trial court's denial of McKay's petition. First, it noted that appellate review of a trial court's finding of court congestion is well-established and requires a defendant to show that

at the time the trial court made its decision to postpone trial, the finding of congestion was factually or legally inaccurate. Such proof would be *prima facie* adequate for discharge, absent further trial court findings explaining the congestion and justifying the continuance. In the appellate review of such a case, the trial court's explanations will be accorded reasonable deference, and a defendant must establish his entitlement to relief by showing that the trial court was clearly erroneous.²⁴⁶

The court of appeals held that the trial court's findings of congestion on July 27, August 24, and October 5 were not clearly erroneous.²⁴⁷ Other cases were set for trial on those days, and there was no suggestion that the trial court knew at the time of the finding of congestion that these "first choice" cases would not be tried.²⁴⁸

McKay also asserted that the cases for which his was continued were not priority cases under Criminal Rule 4. As the supreme court observed in *Clark v. State*,²⁴⁹ a defendant's request for a speedy trial

must be assigned a meaningful trial date within the time prescribed by the rule, if necessary superseding trial dates previously designated for

241. *See id.*

242. *See id.*

243. *See id.*

244. *Id.* at 1186.

245. *See id.*

246. *Id.* at 1187 (quoting *Clark v. State*, 659 N.E.2d 548, 552 (Ind. 1995)).

247. *See id.* at 1188-90.

248. *Id.* at 1189.

249. 659 N.E.2d 548 (Ind. 1995).

civil cases and even criminal cases in which Criminal Rule 4 deadlines are not imminent. We recognize, however, that emergencies in either criminal or civil matters may occasionally interfere with this scheme. Similarly, there may be major, complex trials that have long been scheduled or that pose significant extenuating circumstances to litigants and witnesses, which will, on rare occasions, justify application of the court congestion or exigent circumstances exceptions.²⁵⁰

However, the court of appeals declined to adopt McKay's proposal of "[a] bright-line rule that all Crim. R. 4 cases must be tried before any other case that is not a Crim. R. 4 priority."²⁵¹ Finally, the court of appeals also found that McKay had abandoned his request for a speedy trial when he failed to object to the August 24 trial setting.²⁵²

Although the court of appeals explicitly rejected McKay's argument that his Criminal Rule 4(B) case should have been tried before cases without priority status under Criminal Rule 4, it remains unclear what a similarly-situated defendant should do in order to preserve his right to a speedy trial in the face of repeated continuances due to purported court congestion. The supreme court's language in *Clark*, while not unequivocal, requires a "meaningful trial date within the time prescribed by the rule"²⁵³ Thus, a defendant under the circumstances would be well-advised to object to any finding of congestion in which the "first choice" case is not a Criminal Rule 4(B) case or, for that matter, another Criminal Rule 4(B) case in which fewer days attributable to the State have elapsed. When the trial court announces its trial settings for a given day, a defendant might also wish to object if his or her case appears below cases in which Criminal Rule 4 deadlines are less imminent. A trial court faced with a defense motion that includes calculations clearly showing its case has a higher priority under Criminal Rule 4 may very well want to alter its trial settings accordingly.

G. Discovery Violations

In a pair of opinions issued on the same day, the supreme court rather pointedly expressed the importance of prosecutors making *timely* disclosures of agreements with witnesses.²⁵⁴ Both cases originated in Marion County.²⁵⁵

In *Goodner v. State*, the State revealed to defense counsel on the second day of trial that it had previously offered to recommend a bond reduction for the sole eyewitness of the shooting, who had already testified, in exchange for that

250. *Id.* at 551-52.

251. *McKay*, 714 N.E.2d at 1188.

252. *See id.* at 1189.

253. *Clark*, 659 N.E.2d at 551. Although the supreme court has not considered the application of *Clark* to these circumstances, McKay did not seek transfer.

254. *See Goodner v. State*, 714 N.E.2d 638 (Ind. 1999); *Williams v. State*, 714 N.E.2d 644 (Ind. 1999), *cert. denied*, 120 S. Ct. 1195 (2000).

255. *See Goodner*, 714 N.E.2d at 638; *Williams*, 714 N.E.2d at 644.

witness's testimony.²⁵⁶ Goodner contended on appeal that this belated disclosure constituted prosecutorial misconduct warranting reversal of his conviction.²⁵⁷ The supreme court reiterated the well-established principle that "[a] prosecutor must fully disclose 'express plea agreements or understandings between the State and witnesses, even where such agreements or understandings are not reduced to writing.'"²⁵⁸ The required disclosure is important because the jury's appraisal of "the truthfulness and reliability of a given witness may well be determinative of guilt or innocence."²⁵⁹ Although observing that reversal was not required under current doctrine, the unanimous opinion offered the following stern warning to prosecutors: "We cannot continue to tolerate late inning surprises later justified in the name of harmless error. Continued abuses of this sort may require a prophylactic rule requiring reversal."²⁶⁰ The court further noted that the Indiana Rules of Professional Conduct require prosecutors to "make *timely disclosure* to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense."²⁶¹ It also reminded members of the bench and bar of "their obligation to report such misconduct to the appropriate authorities."²⁶²

In *Williams v. State*,²⁶³ the State called Ronald Rush to testify against the defendant. Almost a year after the murder at issue in *Williams*, Rush was arrested when police found drugs while executing a search warrant at Rush's aunt's house.²⁶⁴ Rush was taken to the police station and asked if he knew anything about the murder with which Williams was eventually charged. After being told that he was facing twenty to fifty years, Rush gave a statement to police that provided numerous details of the crime and Williams' alleged involvement in it.²⁶⁵ Although defense counsel knew that Rush would be called as a witness at trial, had received a copy of Rush's statement to police months prior to the trial, and had deposed Rush before trial, defense counsel did not know that a detective had made a "deal" with Rush not to file drug charges in exchange for his giving a statement to police.²⁶⁶ When the defendant learned of this deal mid-trial, he moved for a mistrial.²⁶⁷ The trial court denied the motion for mistrial but granted Williams' alternative request to strike Rush's testimony and admonish the jury to disregard it.²⁶⁸ Although the court found that the mid-

256. See *Goodner*, 714 N.E.2d at 640.

257. See *id.* at 641-42.

258. *Id.* at 642 (quoting *Wright v. State*, 690 N.E.2d 1098, 1113 (Ind. 1997)).

259. *Id.* (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959)).

260. *Id.*

261. *Id.* at 643 (quoting IND. PROFESSIONAL CONDUCT Rule 3.8(d)).

262. *Id.* (citing IND. PROFESSIONAL CONDUCT Rule 8.3(a)).

263. 714 N.E.2d 644 (Ind. 1999).

264. See *id.* at 647.

265. See *id.* at 647-48.

266. *Id.* at 648.

267. See *id.*

268. See *id.*

trial disclosure of this deal did not violate *Brady v. Maryland*²⁶⁹ and its progeny,²⁷⁰ the supreme court held that the trial court's exclusion of Rush's testimony was sufficient and therefore the trial court properly denied the motion for mistrial.²⁷¹

H. Jury Instructions

In *Scisney v. State*,²⁷² the supreme court granted transfer "to address whether a party must tender an alternative instruction in order to preserve a claim of instruction error."²⁷³ In *Scisney*, the trial court proposed to combine separate instructions on the issue of constructive possession, and the defendant objected but did not tender an alternative instruction.²⁷⁴ The court of appeals, citing Indiana Supreme Court precedent, held that the failure to tender an alternative instruction waived the error on appeal.²⁷⁵ The supreme court observed, however, that in previous cases addressing waiver of instructional error, the outcome of the case "did not rest solely upon the failure to tender an alternative instruction but rather included other reasons," such as failing to make an objection, provide a basis for the objection, or include the instruction and objection in the defendant's appellate brief.²⁷⁶ The court found that the proper focus should be on "whether an instruction objection at trial was sufficiently clear and specific to inform the trial court of the claimed error and to prevent inadvertent error."²⁷⁷ Thus, the court held:

[A]ppellate review of a claim of error in the giving of a jury instruction requires a timely trial objection clearly identifying both the claimed objectionable matter and the grounds for the objection, but that the tender of a proposed alternative instruction is not necessarily required to

269. 373 U.S. 83 (1963).

270. See *Kyles v. Whitley*, 514 U.S. 419 (1995); *United States v. Bagley*, 473 U.S. 667 (1985); *United States v. Agurs*, 427 U.S. 97 (1976).

271. *Williams*, 714 N.E.2d at 649. As noted in *Williams* and other cases, the standard for reversal based on a violation of a trial court's discovery order is a difficult one for defendants to meet: "Trial courts are given wide discretionary latitude in discovery matters and their rulings will be given deference on appeal. Absent clear error and resulting prejudice, the trial court's determination of violations and sanctions will be affirmed." *Id.* (citations omitted). However, the court of appeals found in *Lewis v. State*, 700 N.E.2d 485 (Ind. Ct. App. 1998), that this standard was met and the State's disclosure of fingerprint evidence two days before trial warranted reversal.

272. 701 N.E.2d 847 (Ind. 1998).

273. *Id.* at 847-48.

274. See *id.* at 848.

275. See *Scisney v. State*, 690 N.E.2d 342, 347 (Ind. Ct. App. 1997) (citing *Whittle v. State*, 542 N.E.2d 981 (Ind. 1989); *Springer v. State*, 463 N.E.2d 243 (Ind. 1984)), *aff'd in part and vacated in part*, 701 N.E.2d 847 (Ind. 1998).

276. *Scisney*, 701 N.E.2d at 848.

277. *Id.* (citing *Mitchem v. State*, 685 N.E.2d 671, 675 (Ind. 1997)).

preserve the claim of error.²⁷⁸

Because Scisney objected on the general ground that the instruction was an unclear statement of the law but failed to explain why the instruction was unclear or what could be done to correct it, the court found that his claim of instructional error was waived.²⁷⁹

In *Brown v. State*,²⁸⁰ the supreme court addressed the proper nature of counsel's objections and the trial court findings in cases involving lesser-included offense instructions. The supreme court's oft cited opinion in *Wright v. State*²⁸¹ sets forth a three-part test to be employed when a party requests a lesser-included offense instruction. The trial court must (1) determine whether the lesser-included offense is inherently included in the crime charged; if not, (2) determine whether the lesser-included offense is factually included in the crime charged; and, if either, (3) determine whether a serious evidentiary dispute exists whereby the jury could conclude that the lesser offense was committed but not the greater.²⁸² In *Champlain v. State*,²⁸³ the supreme court held that when a trial court makes a factual finding on the existence or lack of a serious evidentiary dispute, that finding is entitled to deference on appeal because of the trial court's proximity to the evidence.²⁸⁴ An appellate court reviews such a finding for an abuse of discretion.²⁸⁵ However, if the trial court makes no ruling as to the existence of a serious evidentiary dispute, appellate courts make the determination de novo based on their own review of the evidence.²⁸⁶

Behind the backdrop of these principles and precedent, the supreme court in *Brown* addressed the proper standard of review in cases in which the trial court failed to make a finding regarding the existence of a serious evidentiary dispute, and the defendant failed to argue the point.²⁸⁷ In cases in which counsel makes a clear objection regarding the existence of a serious evidentiary dispute, appellate courts "will undertake a de novo review of the record if the trial court fails to make a finding as to the existence vel non of the serious evidentiary dispute"²⁸⁸ However, if the trial court makes a finding of a serious evidentiary dispute—regardless of whether counsel argued it—the standard of review will be abuse of discretion.²⁸⁹ The stated purpose for this new layer of *Wright* is to encourage counsel to present the issue clearly to the trial court,

278. *Id.* at 849.

279. *See id.*

280. 703 N.E.2d 1010 (Ind. 1998).

281. 658 N.E.2d 563 (Ind. 1995).

282. *See id.* at 566-67.

283. 681 N.E.2d 696 (Ind. 1997).

284. *See id.* at 700.

285. *See id.*

286. *See id.*

287. *See Brown v. State*, 703 N.E.2d 1010, 1019 (Ind. 1998).

288. *Id.*

289. *See id.*

thereby assisting the trial court in reaching the correct ruling, which ideally will reduce the need for appeals.²⁹⁰

I. Jury Deliberations

As discussed in last year's survey,²⁹¹ the supreme court in *Bouye v. State*²⁹² resolved a court of appeals split regarding when Indiana Code section 34-1-21-6 is triggered. That statute, which now appears as Indiana Code section 34-36-1-6, provides:

If, after the jury retires for deliberation:

(1) there is a disagreement among the jurors as to any part of the testimony; or

(2) the jury desires to be informed as to any point of law arising in the case;

the jury may request the officer to conduct them into the court, where the information required shall be given in the presence of, or after notice to, the parties or the attorneys representing the parties.²⁹³

The *Bouye* court held that the statute applies only in those cases "in which the jury explicitly indicate[s] a disagreement."²⁹⁴ The question unanswered by *Bouye*, however, is what trial court confronted with a note from a deliberating jury that does not explicitly indicate a disagreement should do? A few cases from the survey period suggest that there is no clear answer.

In *Bouye*, the jury note read, "Deborah's testimony," and the trial court responded, "Deborah's testimony—no transcripts are available."²⁹⁵ The supreme court held the statute was not implicated because the note did not manifest a disagreement.²⁹⁶ It did not address whether any further inquiry should have taken place, thus, it would appear that a denial of a request that does not explicitly manifest a disagreement is at least an acceptable, if not the preferable approach under *Bouye*.

290. See *id.* In a concurring opinion, Chief Justice Shepard expressed skepticism of the likelihood that the new "system of shifting standards" would achieve its objections and stated his preference for "the plain old 'abuse of discretion'" standard. *Id.* at 1021-22 (Shepard, C.J., concurring in result).

291. See Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 32 IND. L. REV. 789, 802-03 (1999).

292. 699 N.E.2d 620 (Ind. 1998).

293. IND. CODE § 34-36-1-6 (Supp. 1999).

294. *Bouye*, 699 N.E.2d at 628. However, as highlighted by other cases, there remains a common law protection in determining whether materials may be sent to the jury room during deliberations. See, e.g., *Roberts v. State*, 712 N.E.2d 23, 36 (Ind. Ct. App.), *trans. denied*, 726 N.E.2d 302 (Ind. 1999); *Thacker v. State*, 709 N.E.2d 3 (Ind. 1999); *Robinson v. State*, 699 N.E.2d 1146, 1149 (Ind. 1998).

295. *Bouye*, 699 N.E.2d at 627.

296. See *id.*

However, some trial judges appear to read *Bouye* to encourage, if not require, a determination of whether a jury note, which on its face does not explicitly indicate a disagreement, was in fact motivated by such a disagreement.²⁹⁷ In *Petrie v. State*,²⁹⁸ the deliberating jury sent a note to the trial court that read, "[W]e would like to see the testimony of Ned Popovich, Thomas Goodin, James Fiscus, and then we would like to hear the 911 tape or written transcript of the tape."²⁹⁹ The trial court responded by calling the jury back into open court along with the defendant, defense counsel, and prosecutor. The court then asked the foreperson whether there was a "dispute" or "disagreement" about the testimony and the 911 tape.³⁰⁰ After the foreperson responded affirmatively, the trial court replayed the testimony of the three witnesses and the 911 tape to the jury over Petrie's objection.³⁰¹

Although the court of appeals found that the jury's note did not, on its face, demonstrate an explicit disagreement, it rejected Petrie's argument that the trial court was bound to deny the jury's request without questioning the jurors.³⁰² Rather, the court held that it was within the trial court's discretion to question the jury further to determine whether the jurors had a disagreement about the requested materials.³⁰³ It found no abuse of discretion in the procedure employed, noting that the trial court "[d]id not call undue emphasis to any part of the testimony nor did she suggest disagreement to the jury" before replaying the requested testimony and 911 tape in the presence of all parties as required by the statute.³⁰⁴

297. See, e.g., *Miller v. State*, 716 N.E.2d 367 (Ind. 1999). In *Miller*, the deliberating jury sent a note requesting to "review Sean Miller's testimony on direct testimony and the transcript of the taped statements of Sean Miller's March 1997 statement to Detective Frazier." *Id.* at 370. The trial court discussed the note with both parties on the record and responded with a note that read:

The law does not permit me to allow you to review testimony unless you have a disagreement as to the testimony. If you simply cannot recall the testimony, then you are required to decide the case based on your memory of the witnesses' testimony. If you do have a disagreement, please indicate that in writing on this paper and give it back to Candi [the bailiff] now.

Id. The State and defense counsel both agreed to the trial court's response before it was sent to the jury. The jury replied, "We simply cannot recall. We understand your ruling." *Id.* On appeal, Miller made the unusual argument that the trial court erred "in advising the Jury as to the question of 'recall.'" *Id.* However, the supreme court noted that defense counsel concurred in the trial court's handling of the matter and Miller cited no authority for the proposition that the trial court's response was erroneous. See *id.*

298. 713 N.E.2d 910 (Ind. Ct. App. 1999).

299. *Id.* at 911.

300. *Id.* at 911-12.

301. See *id.* at 912.

302. See *id.* at 912-13.

303. See *id.* at 913.

304. *Id.*

J. Double Jeopardy Under the Indiana Constitution

On October 1, 1999, the Indiana Supreme Court issued several long-awaited opinions addressing the protection afforded criminal defendants under article I, section 14 of the Indiana Constitution.³⁰⁵ The lead opinion, *Richardson v. State*,³⁰⁶ began with the observation that the Indiana Double Jeopardy Clause is "distinct from its federal counterpart in the Fifth Amendment to the United States Constitution."³⁰⁷ Prior to *Richardson*, there had been considerable confusion regarding whether the Indiana Constitution provided any additional protection beyond the federal protection as explained by the United States Supreme Court in *Blockburger v. United States*.³⁰⁸ The *Blockburger* test asks "whether each [statutory] provision requires proof of an additional fact which the other does not."³⁰⁹ Beginning most notably with *Games v. State*,³¹⁰ the supreme court suggested that the *Blockburger* test may be the only double jeopardy protection available to defendants.³¹¹ According to a footnote in *Games*, "[T]he defendant does not provide Indiana authority, and we find none from this Court, establishing an independent state double jeopardy protection based upon an analysis of the Indiana Constitution."³¹² In *Richardson*, the court referred to that sentence as "unfortunate" and made clear that the Double Jeopardy Clause of the Indiana Constitution does indeed provide a separate and more expansive protection than the Federal Constitution.³¹³

Article I, section 14 of the Indiana Constitution prohibits one from being placed twice in jeopardy for the "same offense."³¹⁴ The court in *Richardson* described this protection as two-fold: a statutory elements test and an actual evidence test.³¹⁵

The statutory elements test compares the statutory elements of each offense, by looking to the charging instrument to identify those elements necessary for conviction under the statute, and asking "whether the elements of one of the challenged offenses could, hypothetically, be established by evidence that does

305. See *Collins v. State*, 717 N.E.2d 108 (Ind. 1999); *Guffey v. State*, 717 N.E.2d 103 (Ind. 1999); *McIntire v. State*, 717 N.E.2d 96 (Ind. 1999); *Taylor v. State*, 717 N.E.2d 90 (Ind. 1999); *Griffin v. State*, 717 N.E.2d 73 (Ind. 1999); *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999); see also *Emery v. State*, 717 N.E.2d 111 (Ind. 1999) (discussing the statutory provision that prohibits entry of judgment and sentence when a defendant is convicted of an offense and an included offense).

306. 717 N.E.2d 32 (Ind. 1999).

307. *Id.* at 37.

308. 284 U.S. 299 (1932).

309. *Id.* at 304.

310. 684 N.E.2d 466 (Ind.), modified on reh'g, 690 N.E.2d 211 (Ind. 1997).

311. See *id.* at 475.

312. *Id.* at 473 n.7.

313. *Richardson v. State*, 717 N.E.2d 32, 38 n.6 (Ind. 1999).

314. IND. CONST. art. I, § 14.

315. See *Richardson*, 717 N.E.2d at 49.

not also establish the essential elements of the other charged offense.”³¹⁶ There appears to be little, if any, difference between this test and that of *Blockburger*.³¹⁷ The same cannot be said, however, of the actual evidence test, which clearly provides greater protection to defendants.³¹⁸

As the court explained in *Richardson*, the actual evidence test requires examination of the evidence presented at trial

to determine whether each challenged offense was established by separate and distinct facts. To show that two challenged offenses constitute the “same offense” in a claim of double jeopardy, a defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense.³¹⁹

Richardson was charged with robbery and class A misdemeanor battery. The evidence presented at trial demonstrated that Richardson and others beat the victim and took his billfold, then pushed the victim off a bridge.³²⁰ Although the post-robbery pushing of the victim off the bridge “could potentially indicate a subsequent, factually separate battery justifying a separate conviction, there was no actual evidence to prove the element of resulting bodily injury from this separate conduct.”³²¹ Therefore, because Richardson demonstrated a reasonable possibility that the jury used the same facts to establish the essential elements of both offenses, the court found a violation of the Indiana Double Jeopardy Clause and ordered that the battery count be vacated.³²²

In *Taylor v. State*,³²³ the supreme court addressed the double jeopardy issue in the context of a petition for postconviction relief and made the following observation:

With our opinion today in *Richardson v. State*, 717 N.E.2d 32 (Ind.1999), this Court, confronting a body of case law characterized by substantial inconsistencies and seeking to synthesize common elements, formulated a new methodology for analysis of claims under the Indiana

316. *Id.* at 50.

317. *See* Griffin v. State, 717 N.E.2d 73, 78 (Ind. 1999) (“Having found that robbery and conspiracy to commit robbery are not the same offense under the federal *Blockburger* test, we likewise find that the offenses are not the same under Indiana’s analogous statutory elements test.”).

318. Indeed, in *Richardson* and two other cases issued on the same day, the supreme court found a violation of the actual evidence test but not the statutory elements test. *See Richardson*, 717 N.E.2d at 52-53; McIntire v. State, 717 N.E.2d 96 (Ind. 1999); Guffy v. State, 717 N.E.2d 103 (Ind. 1999).

319. *Richardson*, 717 N.E.2d at 53.

320. *See id.* at 54.

321. *Id.*

322. *See id.* at 54-55.

323. 717 N.E.2d 90 (Ind. 1999).

Double Jeopardy Clause. We find that this formulation constitutes a new constitutional rule of criminal procedure, and thus is not available for retroactive application in post-conviction proceedings.³²⁴

Thus, although the appellate courts have applied *Richardson* prospectively, even to cases in which the defendant did not raise a state double jeopardy claim,³²⁵ *Taylor* makes clear that the court will not allow the retroactive application of the *Richardson* formulation to cases on collateral review.

K. Ineffective Assistance of Counsel

In *Woods v. State*,³²⁶ the supreme court resolved long-standing confusion over when a defendant may raise an ineffective assistance of counsel claim. Before *Woods*, some opinions applied general waiver principles to claims of ineffective assistance of counsel that were raised in a postconviction petition on the basis that the claim had been available on direct appeal.³²⁷ On the other hand, if a claim of ineffective assistance was raised on direct appeal, the court had held that it was precluded from being raised in a postconviction proceeding.³²⁸

The supreme court posited three possible approaches to the issue. First, the court considered the State's approach "that the issue of trial counsel's effectiveness is known on direct appeal and therefore waived if not presented."³²⁹ The court rejected this approach because ineffectiveness claims often require record development, and this approach leaves no place for claims "not reasonably knowable until after direct appeal."³³⁰ Second, the court considered whether to allow the deferral of some claims until postconviction if the petitioner had a "valid reason" for the postponement.³³¹ However, the court rejected this approach as generating "more complexity and unpredictability than is desirable."³³² This approach would also require the postconviction court to

324. *Id.* at 95.

325. *See, e.g.,* *Marcum v. State*, 725 N.E.2d 852, 864 (Ind. 2000); *Wise v. State*, 719 N.E.2d 1192, 1200-01 (Ind. 1999).

326. 701 N.E.2d 1208 (Ind. 1998).

327. *See id.* at 1214 (citing *Williams v. State*, 464 N.E.2d 893 (Ind. 1984); *Hollonquest v. State*, 432 N.E.2d 37 (Ind. 1984)).

328. *See id.* at 1215 (citing *Bieghler v. State*, 690 N.E.2d 188, 200-01 (Ind. 1997); *Sawyer v. State*, 679 N.E.2d 1328 (Ind. 1997)).

329. *Id.* at 1216.

330. *Id.* The court also noted:

[E]xpecting appellate lawyers to look outside the record for error is unreasonable in light of the realities of appellate practice. Direct appeal counsel should not be forced to become a second trial counsel. Appellate lawyers may have neither the skills nor the resources nor the time to investigate extra-record claims, much less to present them coherently and persuasively to the trial court.

Id.

331. *Id.* at 1218.

332. *Id.* at 1219.

undertake "the difficult task of seeing the case through appellate counsel's eyes, possibly long after the direct appeal was decided."³³³

Finally, the court considered and adopted a "bright line rule that is understandable:" permitting all claims of ineffective assistance to be raised in a postconviction proceeding if the issue was not raised on direct appeal.³³⁴ It found this approach preferable because most claims require additional evidence to address their merits.³³⁵ In addition, an ineffectiveness claim requires consideration of counsel's overall performance and the likelihood that the error(s) affected the outcome, both of which "rarely lend themselves to resolution in isolation."³³⁶ The supreme court predicted that its holding in *Woods* would "likely deter all but the most confident appellants from asserting any claim of ineffectiveness on direct appeal."³³⁷

Woods represents a significant clarification of existing law. Not surprisingly, its aftermath has been extended to other cases. For example, in *McIntire v. State*,³³⁸ the supreme court was confronted with a direct appeal brief, filed before *Woods*, that raised a claim of trial counsel ineffectiveness.³³⁹ The claim asserted that trial counsel "generally failed to prepare for trial (alleging specific omissions), failed to consult with the defendant and to present evidence at trial (including alibi witnesses after filing a notice of alibi) and sentencing, and failed to object to evidence and to a jury instruction."³⁴⁰ In light of *Woods*, the supreme court declined to entertain the claim, observing that it would be "preferable for the defendant to adjudicate his claim of ineffective assistance of trial counsel in a post-conviction relief proceeding, which would allow the parties to develop and the reviewing court to consider facts outside the present trial record."³⁴¹

In *Etienne v. State*,³⁴² the supreme court addressed a claim of ineffectiveness raised on direct appeal by the same attorney who represented the defendant at trial. The court began its analysis by observing that "[a]rguing one's own ineffectiveness is not permissible under the Rules of Professional Conduct."³⁴³ Although the court had previously entertained such a claim,³⁴⁴ it found that

333. *Id.*

334. *Id.* at 1220.

335. *See id.*

336. *Id.*

337. *Id.* Of course, direct appeal counsel may still develop a factual record in support of a claim through the so-called *Davis* procedure which allows a defendant to suspend a direct appeal to return to the trial court to pursue an immediate petition for postconviction relief. *See id.* at 1219.

338. 717 N.E.2d 96 (Ind. 1999).

339. *See id.* at 101.

340. *Id.*

341. *Id.* at 102.

342. 716 N.E.2d 457 (Ind. 1999).

343. *Id.* at 463 (citing IND. PROFESSIONAL CONDUCT Rule 1.7(b); *In re Sexson*, 666 N.E.2d 402, 403-04 (Ind. 1996)).

344. *See Cook v. State*, 675 N.E.2d 687, 691-92 (Ind. 1996).

Woods required a different response.³⁴⁵ "Because trial counsel are poorly positioned to critique their own performance or to proclaim it deficient, a defendant should not be foreclosed from ever having a fresh set of eyes consider and argue the effectiveness of his or her trial counsel."³⁴⁶ The court held, "under most circumstances"³⁴⁷ it would not entertain ineffectiveness claims raised on direct appeal by trial counsel.³⁴⁸ Indeed, because Etienne's claim was "little more than a rehashing of his other claims," the supreme court declined to entertain it, thereby allowing him to raise a fully developed claim on postconviction.³⁴⁹

L. Exhaustion of State Remedies for Federal Collateral Review

In *O'Sullivan v. Boerckel*,³⁵⁰ the United States Supreme Court examined whether a petitioner seeking federal collateral review of his state conviction exhausted his available state court remedies when he failed to petition for discretionary review of the issues raised in his federal habeas corpus action.

A petitioner seeking to raise issues in a federal habeas corpus proceeding must first have given the state a full and fair opportunity to review those issues.³⁵¹ When he has done so, the petitioner has exhausted his available state court remedies and, as a general rule, may raise those claims in a federal collateral attack on his conviction. When no state court remedy remains available and a petitioner has failed to raise and exhaust a claim in the state courts, the claim is barred by procedural default and may not be raised in a federal habeas corpus proceeding.³⁵² In this case, the Supreme Court addressed whether exhaustion of state court remedies requires a criminal defendant to petition the state's highest court for a discretionary review of issues later presented in a habeas proceeding.³⁵³

After his conviction at trial, Boerckel raised several claims on direct appeal as a matter of right in the Illinois intermediate appellate court without success. Boerckel then sought discretionary review of three claims in the Illinois Supreme Court. The Illinois Supreme Court denied Boerckel's petition for discretionary review.³⁵⁴ Boerckel next filed a petition for habeas corpus relief in federal district court seeking to raise claims that were not included in his petition for

345. See *Etienne*, 716 N.E.2d at 463.

346. *Id.*

347. *Id.* The exception is when "[a]n ineffectiveness claim is sufficiently clear that immediate review is appropriate to avoid unnecessary delay in addressing it." *Id.*

348. See *id.*

349. *Id.*

350. 119 S. Ct. 1728 (1999).

351. See 28 U.S.C. § 2254(b)(1), (c) (1994).

352. See *Coleman v. Thompson*, 501 U. S. 722, 731 (1991).

353. See *Boerckel*, 119 S. Ct. at 1730.

354. See *id.*

discretionary review to the Illinois Supreme Court.³⁵⁵ The district court held that Boerckel had procedurally defaulted on those claims.³⁵⁶ The United States Seventh Circuit Court of Appeals reversed, holding that exhaustion did not require a petitioner to seek discretionary review.³⁵⁷ The United States Supreme Court granted certiorari to resolve a conflict on the issue among the Courts of Appeals.³⁵⁸

In a 6-3 decision, the United States Supreme Court held that, although the petitioner had no right to review in the Illinois Supreme Court, he had a right to raise his claims before the court, which is all 28 U.S.C. § 2254(c) requires.³⁵⁹ Thus, the Court concluded that a federal habeas petitioner must seek available, discretionary review of his claims to satisfy the exhaustion requirement of 28 U.S.C. § 2254(b)(1) and (c).³⁶⁰

Like Illinois, Indiana has a two-tiered appellate system for most criminal appeals.³⁶¹ As such, under the holding of this case, before a federal habeas petitioner challenging an Indiana conviction can present a claim in a federal habeas proceeding, he must have sought discretionary review of the claim by raising it in a petition to transfer to the Indiana Supreme Court.³⁶² However, this may not always be the case. As pointed out by Justice Souter in his concurring opinion³⁶³ and Justice Stevens in his dissenting opinion,³⁶⁴ the majority opinion in *Boerckel* seems to leave open the possibility that a state with discretionary appellate review procedures may issue a statement to the effect that the failure to raise all issues at the discretionary appellate level will not result in procedural default of those issues in a federal habeas proceeding.³⁶⁵ Because the Indiana Supreme Court has not issued such a policy statement, criminal defendants would be well-advised to seek transfer of any claims they may later wish to raise in a federal habeas petition.

CONCLUSION

In sum, two opinions from the survey period, *Woods* and *Richardson*, are especially significant, and a few others touch upon issues worth watching in the future. *Richardson*³⁶⁶ is plainly the opinion that will have the widest impact.

355. See *id.* at 1730-31.

356. See *Boerckel v. O'Sullivan*, No. 94-3258 (C. D. Ill. Oct. 28, 1996).

357. See *Boerckel v. O'Sullivan*, 135 F. 3d 1194 (7th Cir. 1998), *rev'd*, 119 S. Ct. 1728 (1999).

358. See *Boerckel*, 119 S. Ct. at 1731.

359. See *id.* at 1733.

360. See *id.* at 1733-34.

361. See IND. CONST. art. VII, §§ 4, 6.

362. See IND. R. APP. P. 11(B).

363. See *Boerckel*, 119 S. Ct. at 1734-35 (Souter, J., concurring).

364. See *id.* at 1740 (Stevens, J., dissenting).

365. See *id.* at 1734 (Souter, J., concurring).

366. See *supra* Part II.J.

Defendants who believe their multiple convictions violate double jeopardy principles now have a much easier path to relief under the actual evidence test enunciated in *Richardson* than that previously available under the federal Double Jeopardy Clause. However, in response to *Richardson*, prosecutors will likely become more deliberative in their selection of charges and arguments at trial, thereby allowing at least some multiple convictions or enhancements of offenses to stand under the actual evidence test.

Woods resolved longstanding confusion as to when to raise a claim of ineffective assistance of counsel.³⁶⁷ Before *Woods*, direct appeal counsel faced the unpleasant dilemma of raising an often half-baked (record-based) claim that would then bar postconviction counsel from later raising a fully developed claim, or raising no claim at all and risk having the postconviction court find the claim waived because it was available, but not raised, on direct appeal. After *Woods*, only counsel who are confident they have discovered an error of reversible magnitude should raise an ineffectiveness claim on direct appeal. Most claims are likely to be saved for postconviction proceedings.

The problem with belated disclosures of discovery by the State led a unanimous supreme court in *Goodner*³⁶⁸ to threaten the adoption of a prophylactic rule of reversal if abuses continued. The court also observed that disciplinary sanctions may be imposed on prosecutors who fail to make timely disclosure of evidence beneficial to the defense. One would expect, in light of these significant threats of conviction reversal and disciplinary sanctions, that prosecutors will take heed and issues regarding the untimely disclosure of discovery will not surface in future cases.

Finally, panels of the court of appeals issued conflicting opinions on the issues of non-mutual collateral estoppel³⁶⁹ and the belated addition of habitual offender charges³⁷⁰ during the survey period. The supreme court will likely be called upon to resolve these splits in the upcoming months or years.

367. See *supra* Part II.K.

368. See *supra* Part II.G.

369. See *supra* Part II.D.

370. See *supra* Part II.E.

SURVEY OF EMPLOYMENT LAW DEVELOPMENTS FOR INDIANA PRACTITIONERS

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INTRODUCTION

The employment law highlight of the 1999 survey period was the U.S. Supreme Court's decision, embodied in three separate opinions, that mitigating measures are considered in determining whether a plaintiff is entitled to protection under the Americans With Disabilities Act.¹ Meanwhile, the Seventh Circuit Court of Appeals took on the Great Taco Chips Caper and the Coffee Room Rebellion, and issued other significant decisions in various substantive and procedural areas of employment law. Although most employment law developments occur in the federal courts, there was some legislative and judicial action of interest to Indiana employment law practitioners at the state level, as well. This Article summarizes the survey period decisions of greatest import for Indiana employment law practitioners, but is not intended as a complete recitation of all decisions or developments.

I. TITLE VII

A. Hostile Environment Harassment

One of the most perplexing issues under Title VII is hostile environment harassment. The U.S. Supreme Court has made clear that harassment based on protected class status is an actionable form of discrimination and that harassment may occur either in the form of specific employment decisions with immediate consequences ("quid pro quo" harassment²) or a hostile working environment.³ However, harassment must be "severe or pervasive" to rise to the level of a hostile environment.⁴ Questions arise because severity and pervasiveness are very much in the eye of the beholder. The Seventh Circuit handed down several decisions during the survey period that focused on drawing the line between boorish but legal behavior and actionable harassment.

In *Hardin v. S. C. Johnson & Son, Inc.*,⁵ the Seventh Circuit applied the principle that obnoxious behavior does not necessarily constitute actionable behavior under Title VII. Plaintiff Hardin's production line supervisor allowed a door to close in Hardin's face, startled Hardin by driving up behind her in an

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1. See *Albertsons, Inc. v. Kirkingburg*, 119 S. Ct. 2162 (1999); *Murphy v. United Parcel Serv., Inc.*, 119 S. Ct. 2133 (1999); *Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139 (1999).

2. *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57, 64 (1986).

3. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998).

4. *Meritor*, 477 U.S. at 67.

5. 167 F.3d 340 (7th Cir.), *cert. denied*, 120 S. Ct. 178 (1999).

electric cart, cut her off in a parking lot, and frequently used profane and abusive language.⁶ Hardin sued for harassment based on her race and gender.⁷ The offensive language included comments such as telling Hardin to "get your head out of your ass" and referring to Hardin as a "dumb motherfucker."⁸ The evidence showed, however, that the supervisor spoke in an equally rude manner to all employees, regardless of their race or sex. Although the nonverbal incidents were directed only at Hardin, the court did not discern any racial or gender overtones that would bring the misconduct within the scope of Title VII.⁹

In *Minor v. Ivy Tech State College*,¹⁰ the complained-of behavior was less blatant but allegedly sexual in nature. Guidance counselor Anne Minor complained that the college chancellor had plagued her with unnecessarily frequent telephone calls that had no apparent business purpose, and had spoken in a sexy tone during those calls. Minor described the calls as "stalker-like" and as having sexual overtones, but did not provide specifics.¹¹ On one occasion the chancellor, upon entering Minor's office, told Minor that he had been watching her through a window, and that same month the chancellor called Minor at home to wish her Merry Christmas, although he had already extended greetings to all employees at the office.¹² The only physical act of alleged harassment occurred when the chancellor, during a meeting with Minor and another employee whom the chancellor believed were spreading rumors about him, embraced Minor, kissed and squeezed her, and asked her "Now, is this sexual harassment?"¹³

Judge Posner, in the *Minor* opinion, readily disposed of the incident cited as insufficient to constitute sexual harassment, and in the process took the opportunity to make several general points.¹⁴ He first addressed Minor's testimony regarding comments and rumors that Minor had heard about the chancellor from other employees. Courts, Judge Posner noted, "must be particularly assiduous to enforce the hearsay rule in sexual harassment cases" in the interests of protecting the privacy of victims and also of accused harassers, who might feel forced to settle or abandon suits to avoid further reputational damage.¹⁵ Furthermore, displaying a (metaphorically) "hands-on" management style falls short of stalking, which is actionable.¹⁶ Judge Posner acknowledged the importance of context in evaluating remarks, but distinguished between

6. See *id.* at 345.

7. See *id.* at 343.

8. *Id.*

9. See *id.* at 346. The court also noted that the conduct was not sufficiently severe to constitute a hostile environment. See *id.*

10. 174 F.3d 855 (7th Cir. 1999)

11. *Id.* at 856.

12. See *id.*

13. *Id.* at 857.

14. See *id.* Although some of the alleged conduct fell outside the limitations period, the court concluded that even taking it into account, the claim fell short of actionability. See *id.*

15. *Id.* at 857.

16. *Id.* at 858.

objective characteristics such as accompanying gestures, facial expressions, and physical proximity between speaker and listener and "nebulous impressions concerning tone of voice, body language, and other nonverbal, nontouching modes of signaling."¹⁷

The Seventh Circuit has consistently made clear that sexually suggestive behavior must be fairly egregious for a plaintiff to prevail. In *Adusimilli v. City of Chicago*,¹⁸ the plaintiff, an administrative assistant with the Chicago Police Department, complained about sexual innuendo in the form of comments and conduct. Her supervisor, claimed the plaintiff, had advised the plaintiff to break a banana in the middle rather than eat it whole, to avoid being laughed at.¹⁹ A coworker, also concerned with the plaintiff's approach to fruit, suggested that the plaintiff wash her banana before eating it. The same coworker asked the plaintiff to explain the significance of putting one rubber band on top and another on the bottom.²⁰ Yet another coworker warned the plaintiff that waving at squad cars in front of the police station might lead people to believe that the plaintiff was a prostitute. Two police officers allegedly stared at the plaintiff's breasts, and one touched the plaintiff's upper arm during computer training. A third officer also stared at the plaintiff's breasts, asked another co-worker if that co-worker had worn a "low-neck top" the previous evening, and poked the plaintiff's fingers twice and her buttocks once.²¹ The plaintiff reported the buttocks-poking to a lieutenant, but an investigation turned up insufficient evidence to justify corrective action. The accused poker was assigned soon after to duties that required him to work periodically at a computer terminal a few feet from the plaintiff's desk,²² and he continued to stare at the plaintiff in an offensive manner.²³

The court found the conduct "too tepid or intermittent or equivocal to make a reasonable person believe that she has been discriminated against on the basis of her sex."²⁴ The court characterized even the worst misconduct, the objectionable poke in the buttocks, as "relatively mild."²⁵ The plaintiff's argument that the City had created a hostile environment by assigning her accused harasser to work nearby was unsuccessful. The conduct that had triggered the complaint did not rise to the level of harassment, said the court, citing the often-quoted case of *Saxton v. American Telephone and Telegraph Co.*²⁶ In *Saxton*, a supervisor's mere presence did not create a hostile

17. *Id.*

18. 164 F.3d 353 (7th Cir. 1998), *cert. denied*, 120 S. Ct. 450 (1999).

19. *See id.* at 357.

20. *See id.*

21. *Id.*

22. *See id.*

23. *See id.* at 358.

24. *Id.* at 362 (quoting *Galloway v. General Motors Service Parts Operations*, 78 F.3d 1164, 1168 (7th Cir. 1996)).

25. *Id.*

26. *Id.* (citing *Saxton v. American Telephone and Telegraph Co.*, 10 F.3d 526, 536 n.18 (7th

environment although the supervisor had previously placed his hand on the plaintiff's leg above her knee, rubbed his hand on the plaintiff's upper thigh, forcibly kissed the plaintiff, and lurched out at the plaintiff from behind bushes.²⁷ Clearly, the Seventh Circuit will not interpret "severe or pervasive" in an expansive manner, and plaintiffs claiming harassment must make a very substantial evidentiary showing.

Courts are sometimes, although not always, less tolerant of harassment in the form of racial or ethnic slurs, as shown in the split opinion of *Sanders v. Village of Dixmoor*.²⁸ Plaintiff Sanders, a part-time police officer, was present during a transition meeting between an outgoing and an incoming Village police chief.²⁹ Sanders had supported the outgoing chief, who lost the position when a newly-elected mayor took office. During the discussion, Sanders interrupted several times to demand information about scheduling and about his own role after the transition. The new chief told Sanders twice that he did not wish to discuss that particular matter at that time, but Sanders persisted and, after a heated exchange, the new chief allegedly declared to Sanders, "Nigger, you're suspended."³⁰ Sanders brought suit for discriminatory suspension and a hostile work environment.³¹

A split panel affirmed summary judgment for the Village, on the basis that the single racial epithet did not create a hostile environment, and that Sanders waived the claim of discriminatory suspension by failing to argue that his suspension was based on race rather than on insubordination. Neither had Sanders argued constructive discharge at the trial court level.³² Judge Evans dissented, stating that the court should be able to "tease" a discrimination claim from the allegations. In Judge Evans' view, the allegation that Sanders' white supervisor had used "as vile a racial epithet as has ever been uttered" in suspending Sanders was sufficient to create a triable issue of racial discrimination.³³

The Seventh Circuit was even less receptive to a claim based on ethnic slurs in *Filipovic v. K & R Express Systems, Inc.*,³⁴ and affirmed summary judgment for the employer on a claim of national origin discrimination. Plaintiff Filipovic, a native of Yugoslavia and a Teamster, worked as a dockman.³⁵ Filipovic claimed that four comments by co-workers and supervisors related to his national origin, spread over the course of more than a year, created a hostile

Cir. 1993)).

27. See *id.* (citing *Saxton*, 10 F.3d at 536 n.18).

28. 178 F.3d 869 (7th Cir.), *cert. denied*, 120 S. Ct. 529 (1999).

29. See *id.* at 869.

30. *Id.*

31. See *id.*

32. See *id.* at 870.

33. *Id.* at 872 (Evans, J., dissenting).

34. 176 F.3d 390 (7th Cir. 1999).

35. See *id.* at 393.

environment.³⁶ The court noted that Filipovic had undisputedly participated in the name-calling among co-workers.³⁷ Furthermore, the comments were “few in number, were not physically threatening, were spread out over more than a year, and were relatively mild compared to epithets that can be lodged against other racial, ethnic and religious groups.”³⁸ Again citing *Saxton*, the court characterized the slurs as “simply part of the normal dock environment and [] too infrequent to constitute the ‘concentrated or insistent barrage’ necessary” for a hostile environment.³⁹

Although the Seventh Circuit is not noted for being generously disposed toward hostile environment claims, two survey period cases stand in opposition to this trend. In *Smith v. Sheahan*,⁴⁰ the Seventh Circuit reversed summary judgment for the Cook County Sheriff’s Department although the plaintiff’s case rested on a single incident of harassment.⁴¹ Smith, a female guard at the county jail, was violently assaulted by Gamble, a male guard, who was convicted for criminal assault as a result of the incident.⁴² Smith and Gamble had argued, and Gamble called Smith a “bitch,” threatened to “fuck [her] up,” pinned her against a wall, and twisted her wrist hard enough to draw blood and to later require corrective surgery for ligament damage.⁴³ Smith complained to her employer, but the response was “an institutional shrug of the shoulders,” with no disciplinary action, although Smith and Gamble were kept separate thereafter.⁴⁴ A departmental investigator downplayed the seriousness of the incident and jokingly advised Smith to “kiss and make up” with Gamble.⁴⁵ Smith offered affidavits from six other female guards as proof that Gamble targeted women for verbal abuse and physical threats.⁴⁶ Ultimately, even though management was aware of Gamble’s criminal conviction, he was promoted and Smith was reassigned to guard inmates with psychiatric problems, which she considered a demotion.⁴⁷

The district court found for the employer on the basis that sex-based harassment must be repeated to be actionable, and the plaintiff’s claim was based on a single incident. A divided Seventh Circuit panel disagreed, noting that the

36. See *id.* at 398. Some of the disparaging names that Filipovic cited, not all of which fell within the limitations period, were “Russian dick head,” “dirty Commie,” “piece of shit,” “sheep fucker,” “fucking foreigner,” and “barbarian.” *Id.* at 393.

37. See *id.*

38. *Id.* at 398.

39. *Id.* (quoting *Baskerville v. Culligan Int’l Co.*, 50 F.3d 428, 431 (7th Cir. 1995)).

40. 189 F.3d 529 (7th Cir. 1999).

41. See *id.* at 530-31.

42. See *id.* at 530.

43. *Id.* at 531.

44. *Id.*

45. *Id.*

46. See *id.*

47. See *id.* at 532.

standard is severe "or" pervasive.⁴⁸ The district court had also taken into account the fact that the plaintiff made the choice to work in the "aggressive setting" of the jail.⁴⁹ Again, a Seventh Circuit majority disagreed, noting that "[t]here is no assumption-of-risk defense to charges of workplace discrimination," although it did acknowledge that workplace cultures vary from setting to setting, and that juries would appropriately apply common sense, with due consideration to social context.⁵⁰ Judge Bauer dissented from the decision to remand the case for trial, stating that the proper claim was for battery, and the bullying of a woman by a man did not justify expanding the claim into a Title VII case.⁵¹

In contrast, in *Wilson v. Chrysler Corp.*,⁵² the dispositive factor for the court was the source and quantity of alleged incidents rather than the severity of individual incidents.⁵³ Plaintiff Wilson, an assembly line worker, complained of sexually explicit cartoons taped to her work station on three occasions; fake penises placed on cars in her work area on two occasions, and a lewd greeting card signed by a supervisor and three foremen as well as by thirty-four co-workers.⁵⁴ Wilson also complained of a co-worker positioning his hand so that when Wilson bent down, her breasts would touch his hand.⁵⁵ Wilson cited many other incidents, including lewd comments and verbal abuse, that fell outside the limitations period, but the court noted that at least some would likely still be cognizable claims under a continuing violation theory, based on the alleged pattern of escalating misconduct.⁵⁶

The district court concluded that the only incident that Wilson reported to her employer was the greeting card, which was not sufficient to either trigger heightened employer liability for supervisory harassment or to adequately put the employer on notice of the pattern of harassment.⁵⁷ The Seventh Circuit, however, noted that Wilson claimed that her complaints to management had been more frequent. The court also looked to the possibility of constructive notice, which "may be presumed where the work environment is permeated with pervasive harassment."⁵⁸ Based on the public, exhibitionist nature of the actions alleged, the court found it incredible that management could have been oblivious to the incidents in the plant.⁵⁹

48. *Id.* at 533.

49. *Id.* at 534.

50. *Id.* at 534-35; *see also* *Filipovic v. K & R Express Systems, Inc.*, 176 F.3d 390, 398 (7th Cir. 1999) (noting that ethnic slurs were part of the normal working environment of a loading dock)).

51. *Smith*, 189 F.3d at 536.

52. 172 F.3d 500 (7th Cir. 1999).

53. *See id.* at 511.

54. *See id.* at 508, 510.

55. *See id.* at 507.

56. *See id.* at 510.

57. *See id.* at 508-09.

58. *Id.* at 509.

59. *See id.* at 509. This conclusion by the court put Chrysler in a legal quandary because

The court found a triable issue on the hostile environment claim. Wilson presented an unusual case because she claimed that she was targeted by a number of alleged harassers who launched a multifaceted campaign of frequent and almost routine hostile or abusive actions.⁶⁰ The court summarized Wilson's charge as harassment so pervasive that it was virtually an institutional norm. Therefore, the majority concluded that the evidence presented justified a trial on the merits.⁶¹

Wilson was less successful with her retaliation charge.⁶² While on disability leave, Wilson was terminated for the stated reason that paranoid schizophrenia rendered her unqualified to return to work.⁶³ The majority held that Wilson was estopped from arguing her qualification to return to work by the fact that she had applied for and accepted social security disability benefits, although she later sought to retract her application and return the money.⁶⁴ A plaintiff receiving social security disability benefits may still bring a claim under the Americans With Disabilities Act (ADA) because total disability under the social security rules is defined differently from "qualified individual with a disability" under the ADA.⁶⁵ But here, the inquiries were parallel—whether Wilson did in fact suffer from paranoid schizophrenia. Wilson had not been consistent in her claim, which made the panel wary that she was "playing fast and loose with the courts."⁶⁶

Judge Easterbrook, in a separate concurrence, was not convinced that social security disability benefits would always be incompatible with other claims based on the plaintiff's fitness to work.⁶⁷ A social security applicant might, the judge pointed out, credibly argue that he was disabled in law under the social security rules but not in fact.⁶⁸ Here, however, Wilson did not contend that anyone with paranoid schizophrenia remained employed by Chrysler, nor had Wilson sought other employment since 1991. This lack of initiative, according to Judge Easterbrook, belied Wilson's contention that she filed for social security disability benefits only out of fear of losing her employment benefits.⁶⁹

In addition to the question of how much is enough to constitute a hostile environment, courts struggle with the issue of who qualifies as a supervisor in harassment cases. In June 1998, the U.S. Supreme Court held that employers are strictly liable for harassment committed by supervisors, even if the victim suffered no tangible adverse employment action.⁷⁰ Employers who negligently

it could not argue that it adequately responded to complaints that it claimed it never heard.

60. *See id.* at 511.

61. *See id.*

62. *See id.* at 513.

63. *See id.* at 503.

64. *See id.* at 504, 506.

65. *Id.* at 505.

66. *Id.* at 505.

67. *See id.* at 511-12.

68. *See id.* at 512.

69. *See id.* at 513.

70. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998). If the employee suffered

fail to act reasonably in discovering or remedying the harassment are also liable for harassment committed by the victim's co-workers.⁷¹ In *Parkins v. Civil Constructors of Illinois, Inc.*,⁷² the truck driver plaintiff claimed harassment in the form of foul language, sexual anecdotes and references, and unwelcome touching.⁷³ Two of the alleged harassers were foremen, whom the plaintiff characterized as supervisors.⁷⁴ Looking to the common law of agency, Judge Manion writing for the Seventh Circuit noted that the focal question was not job title, but actual supervisory authority.⁷⁵ Supervisory status turns on the ability to affect terms and conditions of the victim's employment, primarily the power "to hire, fire, demote, transfer, or discipline. . . ."⁷⁶ Here, because the plaintiff worked with as many as ten different foremen whose authority was limited to directing the plaintiff where to drop off or pick up a load, neither of the two alleged harassers qualified as a supervisor.⁷⁷

A final area of developing harassment law is same-sex harassment. In 1998, the U.S. Supreme Court held that same-sex harassment comes within the scope of Title VII if it occurs "because of" the plaintiff's sex.⁷⁸ The Seventh Circuit reversed summary judgment for an employer and remanded for trial on a same-sex harassment claim in *Shepherd v. Slater Steels Corp.*⁷⁹ Plaintiff Shepherd, who worked in a manufacturing stockroom, complained of a series of statements and actions by one Jemison, the only other co-worker in Shepherd's area.⁸⁰ Jemison allegedly frequently exposed himself and fondled his own penis in Shepherd's presence. He also waved his penis inches from Shepherd's face and, upon seeing an ill Shepherd lying face-down on a bench, told Shepherd to turn over or he was "liable to crawl up on top of [you] and fuck [you] in the ass."⁸¹ Shepherd complained to his superiors, but upon returning from a meeting in which Jemison was confronted with Shepherd's allegations, Jemison dropped his pants, shoved his thumb between his own buttocks, and then removed the thumb and flicked it in Shepherd's direction.⁸² Further complaints by Shepherd were brushed off with advice to ignore the offensive conduct, and the objectionable

no tangible adverse employment action, the employer may present an affirmative defense by showing that (1) it took reasonable care to prevent and promptly correct any sexually harassing behavior, and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities offered by the employer, or to otherwise avoid harm. *See id.*

71. *See Smith v. Sheahan*, 189 F.3d 529, 533 (7th Cir. 1999).

72. 163 F.3d 1027 (7th Cir. 1998).

73. *See id.* at 1031.

74. *See id.* at 1032.

75. *See id.* at 1033.

76. *Id.* at 1034.

77. *See id.*

78. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

79. 168 F.3d 998 (7th Cir. 1999).

80. *See id.* at 1000-01.

81. *Id.* at 1001.

82. *See id.*

behavior continued and became more hostile.⁸³ Shepherd ultimately filed a sexual harassment charge with the EEOC, and a week later Jemison and Shepherd engaged in a physical fight that resulted in injuries that required medical treatment for both combatants. Although Shepherd claimed that Jemison instigated the battle by swinging a block of wood at Shepherd,⁸⁴ the employer disciplined both workers and offered a "last chance agreement" that would have separated the two but reduced Shepherd's pay rate.⁸⁵

The district court looked to evidence that Jemison had offended female as well as male co-workers with his sexual conduct, and concluded that the harassment was not because of sex.⁸⁶ A divided Seventh Circuit reviewed the *Oncale* decision, which discusses two ways a plaintiff may establish same-sex harassment as actionable discrimination. First, credible evidence that the harasser is homosexual may justify an assumption that the harasser targeted members of his or her same sex, at least regarding proposals of sexual activity. Second, the plaintiff may show that the harassment involved gender-specific and derogatory terms that demonstrated hostility towards persons of the plaintiff's gender.

Judge Rovner, writing for the majority, did not find Shepherd's allegations to fall within either category, but also concluded that these two types of situations were exemplary, not exclusive.⁸⁷ In assessing the facts as stated by Shepherd, she found that, although the record did not demonstrate whether Jemison was gay, Jemison's behavior could be interpreted as sexual interest, which would support an inference that Shepherd was harassed because he was a man. Alternatively, a fact-finder might conclude that Jemison was simply crude and engaged in whatever behavior would cause Shepherd discomfort. This case, Judge Rovner noted, went beyond sexual references that were incidental to common workplace horseplay and crudity.⁸⁸

In remanding for trial, the majority held that sexual statements or conduct such as saying "fuck me" or grabbing one's crotch are merely taunts with sexual content if their use has little to do with the gender of the listener or observer.⁸⁹ Such juvenile vulgarity is not actionable. If, however, "the context of the harassment leaves room for the inference that the sexual overlay was not incidental—that the harasser was genuinely soliciting sex from the plaintiff or was otherwise directing harassment at the plaintiff because of the plaintiff's sex . . .", a triable issue of fact is raised.⁹⁰ Because the conduct complained of by Shepherd went far beyond "casual obscenity," the majority remanded for

83. *See id.*

84. *See id.* at 1002

85. *Id.* at 1003.

86. *See id.*

87. *See id.* at 1009.

88. *See id.* at 1010.

89. *Id.*

90. *Id.* at 1011.

trial.⁹¹ Judge Bauer dissented, as he did in *Smith v. Sheahan*, and stated his agreement with the trial court's holding that although the behavior at issue was outrageous and offensive, it was not based on gender and therefore not actionable under Title VII.⁹²

B. Reverse Discrimination and Affirmative Action

The University of Wisconsin's Psychology Department voted to offer Paul Hill a tenure-track position.⁹³ The Dean of the College of Letters and Sciences objected because he wanted the department to hire a female instead. The Department had two positions to fill for the semester, and put forth the names of two male candidates, to which the Dean responded by e-mail "[t]wo male candidates cannot go forward."⁹⁴ The Department stood firm, the Dean blocked Hill's recommendation, and the position went unfilled. Hill sued, and the trial court upheld the University's action as a valid affirmative action plan. Thus did the Seventh Circuit, in *Hill v. Ross*, venture onto the shifting sands of when affirmative action plans are permissible.⁹⁵

The court cited the *Bakke* principal that race (or, as in this case, sex) may be considered in a hiring decision, but cannot be dispositive unless the affirmative action plan's purpose is to correct the effects of past discrimination.⁹⁶ Judge Easterbrook described affirmative action plans as ranging along a spectrum, with detailed hiring quotas to overcome past discrimination on one end, and plans that do not involve preferential treatment, but actively seek out minority candidates, on the other. In *Hill*, the University did not claim that it adopted its hiring plan to remedy past discrimination.⁹⁷

In ordering a remand, the court outlined the appropriate analysis, citing the U.S. Supreme Court decision in *Johnson v. Transportation Agency of Santa*

91. *Id.* The district court disregarded some statements in Shepherd's affidavit that it ruled inadmissible as contradicting his deposition testimony, and also found that the harassment ceased when the employer completed its investigation. Furthermore, it noted that there was some evidence that the accused harasser had engaged in sexually offensive conduct in front of female as well as male employees. *See id.* at 1003. The Seventh Circuit disagreed with the first two conclusions, based on an alternative interpretation of Shepherd's deposition responses. *See id.* at 1004, 1006. As to the sexual misconduct in front of a female employee, the Seventh Circuit majority acknowledged that a factfinder could reasonably infer from this evidence that the harassment was not because of sex, but that the evidence was not compelling enough to make that conclusion inevitable. *See id.* at 1011.

92. *See id.* at 1012 (Bauer, J., dissenting).

93. *See Hill v. Ross*, 183 F.3d 586, 588 (7th Cir. 1999).

94. *Id.* at 589.

95. *See id.*

96. *See id.* (citing *University of California v. Bakke*, 438 U.S. 265 (1978)).

97. *See id.* at 589.

*Clara County*⁹⁸ for guidance.⁹⁹ Because Hill had shown that race or sex had played a part in the employment decision, the burden shifted to the University to articulate a legitimate, nondiscriminatory reason for its action. Pursuit of an affirmative action plan could, depending on circumstances, provide such a rationale. Once the University supplied an "exceedingly persuasive" justification, taking into account no record of prior discrimination, the burden would again shift to Hill to prove that the stated reason was pretextual and the plan invalid.¹⁰⁰

The court went on to discuss the use and misuse of statistics in justifying hiring targets, and the particular problem of applying such targets to relatively small employee populations. The University had set a departmental hiring goal of sixty-two percent women, which was based on the male-female ratio of doctorate degrees awarded since 1980.¹⁰¹ If the Department employed 250 or more professors, the court reasoned, a major variance from a sixty-two percent female hiring rate would be unexpected and require justification. However, in this case the Department had four female tenure-track faculty members out of only ten total, and was hiring for two additional positions. Although a sixty-two percent female target ratio would translate into an average of seven female professors given gender-blind hiring practices, it is still statistically unlikely that the Department would have exactly seven females out of twelve tenure-track faculty at any particular time. Therefore, imposing a hiring quota on individual departments in isolation so that each exactly mirrored the relevant population would virtually require discriminatory hiring.¹⁰² Such a plan, Judge Easterbrook concluded, was not sufficiently justified, nor did it take gender into account in a manner narrowly tailored to a persuasive justification. The University therefore faced an uphill battle in defending its actions on remand.¹⁰³

The Seventh Circuit also addressed the issue of reverse discrimination, and clarified the relevant standard for analyzing such cases by adopting a "background circumstances" requirement for the plaintiff's *prima facie* case. In *Mills v. Health Care Service Corp.*,¹⁰⁴ a male health care claims processor complained that female candidates received preferential treatment in promotion decisions.¹⁰⁵ In affirming summary judgment for the employer, Judge Flaum, writing for the panel, reviewed the *McDonnell Douglas-Burdine* method of proving discrimination via indirect evidence. A plaintiff making such a case must demonstrate that she is a member of a protected class; she applied and was qualified for an available position; she was rejected; and the position was either filled by someone outside the protected class or remained open. The burden then

98. 480 U.S. 616 (1987).

99. See *Hill*, 183 F.3d at 590.

100. *Id.*

101. See *id.* at 588.

102. See *id.* at 591.

103. See *id.* at 592.

104. 171 F.3d 450 (7th Cir. 1999).

105. See *id.* at 453.

shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its employment action. Once the defendant states such a reason, the burden shifts back to the plaintiff to prove that the stated reason is pretextual.¹⁰⁶

The problem in reverse discrimination cases is satisfying the first prong because the plaintiff is not a member of a protected class.¹⁰⁷ The court discussed the variants on the McDonnell Douglas test adopted by other circuits, and recognized that a plaintiff could always avoid application of the test by relying on direct, rather than indirect, evidence of discrimination to get past summary judgment.¹⁰⁸ The court noted that it is uncommon for employers to discriminate against majority employees, and that merely eliminating the first prong of the McDonnell Douglas test would result in majority plaintiffs having a lighter prima facie burden than protected class plaintiffs. This would not only be anomalous given that it is protected class members who have historically suffered employment discrimination, it would also weaken the screening function of the prima facie test.¹⁰⁹

Therefore, the court substituted a flexible requirement that a reverse discrimination plaintiff must show "background circumstances" evidencing discrimination. This might take the form of evidence showing that the employer was inclined for some reason to discriminate against majority candidates, or that there was something "fishy" about the facts of the case.¹¹⁰ The hiring of a clearly less qualified minority applicant; a strongly expressed desire to hire a minority applicant; or, as alleged in the instant case, a disproportionate hiring pattern could be sufficient.¹¹¹

Plaintiff Mills met his prima facie burden, but failed to present adequate evidence that his employer's stated reasons for promoting a female to the position he sought were pretextual.¹¹² The employer stated multiple reasons for selecting the woman, including her associate's degree in computer science, her higher oral and written interview scores, and the fact that she smiled more often during her interview.¹¹³ Mills, who needed to show that each reason advanced was pretextual, could not do so, particularly given the Seventh Circuit's frequently repeated reluctance to function as a "super-personnel department" in reviewing business decisions.¹¹⁴

106. See *id.* at 454.

107. See *id.* at 455. Under Title VII, the protected classes are race, religion, sex, color, and national origin.

108. See *id.* at 455-56.

109. See *id.* at 457.

110. *Id.* at 455 (citing *Harding v. Gray*, 9 F.3d 150 (D.C. Cir. 1993)).

111. See *id.* (citing *Duffy v. Wolle*, 123 F.3d 1026, 1036-37 (8th Cir. 1997), *cert. denied*, 523 U.S. 1137 (1998)).

112. See *id.* at 460.

113. See *id.* at 458.

114. *Id.* at 459 (citing *Debs v. Northeastern Illinois University*, 153 F.3d 390, 396 (7th Cir. 1998)).

C. Proving Pretext, and Subjective Hiring Criteria

The issue that tripped up the plaintiff in *Mills* is one that continues to evolve and that has provided the Seventh Circuit with some of its more interesting fact patterns. *Stalter v. Wal-Mart Stores, Inc.*¹¹⁵ began simply enough with a handful of taco chips.¹¹⁶ Plaintiff Stalter, an African-American unloader in the night receiving department of a Wisconsin Wal-Mart store, walked into the employee break room one night and saw an open bag of chips on the counter. According to Stalter, food left open on the counter was generally considered abandoned and available to everyone. According to Wal-Mart, only food left on the tables, not the countertop, was considered abandoned. In any event, as Stalter munched, two Caucasian employees, one of whom was the rightful owner, came in and the owner retrieved her chips. Stalter's previous relationship with the two had been difficult, but he apologized for eating the chips and offered a new bag of chips or a cup of coffee as compensation. The owner told Stalter that the pilferage was "no big deal" and to "forget about it."¹¹⁷

A few days later, however, a supervisor overheard a conversation about the incident, and asked for a written account from the two Caucasian employees, in which the chip owner acknowledged that she had told Stalter to forget the incident after he apologized. Wal-Mart then, as described by the court, proceeded to build a mountain out of a molehill of chips.¹¹⁸ It terminated Stalter for gross misconduct in the form of theft. During discovery, Wal-Mart disclosed that the chip owner herself had also committed an act of gross misconduct, by failing to appear at work by her scheduled start time and lying to her supervisor about why she was absent. However, the Caucasian employee was warned, not terminated. Nonetheless, the district court granted summary judgment to Wal-Mart, finding inter alia that Stalter had technically committed theft and that theft was more serious than lying to a supervisor.¹¹⁹

The Seventh Circuit reversed, holding that Stalter had made a sufficient showing that his termination was really based on race, not theft.¹²⁰ First, the victim had dismissed the incident as trivial, and the punishment was as out of proportion to the offense as "swatting a fly with a sledge hammer."¹²¹ A Caucasian employee who committed a comparable offense got off with a warning.¹²² In addition, Wal-Mart's contention that termination was mandatory for theft was contradicted by its own policy, which did not require termination for theft, but did require termination for dishonesty. Further, whether the problem was actually a theft, or merely a misunderstanding, was an issue of fact.

115. 195 F.3d 285 (7th Cir. 1999)

116. *See id.* at 286.

117. *Id.* at 287.

118. *See id.*

119. *See id.* at 288.

120. *See id.* at 286.

121. *Id.* at 290.

122. *See id.* at 290-91.

Finally, Wal-Mart originally claimed that the victim had complained to management about the theft on her own initiative, and only later corrected this story.¹²³ In summary, the court found that Wal-Mart's purported reason for terminating Stalter failed the "straight-face test" and remanded for trial.¹²⁴

The leader of the Coffee Room Rebellion was less successful in showing pretext, and in *Flores v. Preferred Technical Group*,¹²⁵ the Seventh Circuit affirmed summary judgment for the employer.¹²⁶ Plaintiff Flores, a Hispanic assembly and packing worker, and her fellow union employees were accustomed to taking work breaks whenever they wanted. Their collective bargaining agreement, however, allowed the employer to forbid unauthorized breaks, and also prohibited work stoppages and strikes. In December 1996, the employer announced that it planned to begin enforcing the ban on unauthorized breaks. But when Flores and her co-workers heard rumors that the rule was not being uniformly enforced on all shifts, they decided to take action.¹²⁷ About a dozen employees, later joined by fifteen more, stormed the break room and began to harangue three supervisors about the policy.¹²⁸

Flores admitted to being the loudest protestor and told a supervisor who was taking names to make sure to get hers right. She was among the last to leave, and a supervisor believed that he saw Flores encouraging another group to join the protest, although Flores claimed that she was merely greeting a friend. Flores was terminated for instigating a prohibited work stoppage. Two other Hispanic protestors were not terminated over the demonstration, although one was fired later that same shift for violating a safety rule by wearing a Walkman while working, and the other was not widely regarded as being of Hispanic heritage. One non-Hispanic worker, a temporary employee, was also terminated over the protest.¹²⁹

The employer argued that Flores could not meet her *prima facie* burden, because she could not show that she was meeting legitimate performance expectations when she voluntarily violated work rules.¹³⁰ The court responded that under the facts of the case, no such showing was required, and focused on the issue of whether Flores was targeted for discipline based on race. The employer's stated basis for discharge was Flores' undisputed insubordination. Furthermore, the court agreed that firing all the insurgents would disrupt operations, so that the employer could legitimately make an example of the ringleader.¹³¹ An employer's reason for an employment action need not be reasonable; only honest, and the court declined Flores' invitation to require, as

123. See *id.* at 291.

124. *Id.* at 290, 292.

125. 182 F.3d 512 (7th Cir. 1999).

126. See *id.* at 517.

127. See *id.* at 513.

128. See *id.* at 513-14, 516.

129. See *id.* at 514.

130. See *id.* at 515.

131. See *id.*

does the Sixth Circuit, that the employer's "honest belief" be supported by particularized facts.¹³² The court did note, however, that reasonable beliefs are more likely to be viewed as honestly held.¹³³

Flores' case boiled down to the following: twenty-seven workers rebelled, and the only two who were recognizably Hispanic were terminated by the end of the shift.¹³⁴ The court agreed that the numbers appeared "fishy" but, because Flores failed to link her own discharge to the other termination, concluded that Flores was fired as an "agent provocateur" and not because of her race.¹³⁵

An Italian-American plaintiff was equally unsuccessful in *Indurante v. Local 705, International Brotherhood of Teamsters, AFL-CIO*.¹³⁶ Jack Indurante was hired as a business agent for the union but soon afterwards his boss, Daniel Ligurotis, was terminated for corruption.¹³⁷ Indurante himself was fired over two years later, and claimed, based on several remarks by union managers, that he lost his job as part of a concerted plan to eliminate Italian-Americans.¹³⁸ The alleged remarks were to the effect that all the Italian union employees were "mobsters and gangsters" who were going to be fired, and that "the days of the goombahs are over."¹³⁹ All but the last remark, which occurred five months after Indurante was fired, occurred about sixteen months prior to his termination.¹⁴⁰ The union's stated reason for terminating Indurante and five other business agents was a general house cleaning, to purge the organization of the corruption of the Ligurotis regime.¹⁴¹ The court characterized the comments as "stray remarks," i.e. biased comments by decisionmakers that were unrelated to any adverse employment action.¹⁴² Therefore, the court concluded, they provided some, but not sufficient, evidence of pretext.¹⁴³

Indurante pointed to one non-Italian employee, Ligurotis' personal secretary, who was not only retained but promoted, as evidence that the house-cleaning rationale was pretextual.¹⁴⁴ The majority was not persuaded, because Indurante had undisputedly backed the Ligurotis regime, but Indurante presented no evidence that the very few employees retained had also been Ligurotis supporters.¹⁴⁵

Judge Rovner dissented, because based on the alleged references by two

132. *Id.* at 516 (quoting *Smith v. Chrysler Corp.*, 155 F.3d 799, 806 (6th Cir. 1998)).

133. *See id.*

134. *See id.*

135. *Id.* at 517.

136. 160 F.3d 364 (7th Cir. 1998).

137. *See id.* at 365.

138. *See id.* at 365-66.

139. *Id.* at 366.

140. *See id.*

141. *See id.* at 365.

142. *Id.* at 367.

143. *See id.*

144. *See id.* at 367-68.

145. *See id.* at 368.

decisionmakers to a plan to fire Italian-Americans, she considered a specific reference to the plaintiff unnecessary.¹⁴⁶ She observed that a remark such as "We're going to fire all of the Blacks" would almost certainly be accepted as direct evidence of discrimination, without a requirement that the remark individually refer to the plaintiff's employment situation.¹⁴⁷

Another case involving pretext analysis, *Johnson v. Zema Systems Corp.*, dealt with the so-called "same-actor inference."¹⁴⁸ Johnson, a vice president of sales and marketing for a beer distributorship, was fired for the stated reasons of failure to meet performance expectations and implementation of a plan to reduce layers of management in the organizational structure.¹⁴⁹ Johnson, in support of his race discrimination claim, presented evidence that the sales force was segregated by race and that racially derogatory remarks were commonplace. Johnson also offered evidence that after his termination, his duties to supervise African-American salespersons were assigned to an African-American manager while his duties to supervise white salespersons were assigned to a white person. From this, the court concluded that a jury could find that Johnson was expected to manage and associate only with minority salespersons and that he was fired for refusing to observe these racial restrictions.¹⁵⁰

The magistrate judge who initially recommended summary judgment for the employer relied partially on the "same-actor inference," reasoning that because the same person both hired and fired Johnson, the firing was unlikely to have been based on a discriminatory motive.¹⁵¹ The Seventh Circuit noted the psychological assumption underlying this inference, i.e. that one would not normally hire from a group to which one has an aversion, because of the psychological cost of having to associate with someone from a disfavored group and of having to fire that person later. However, the court said, that assumption may not hold up in some circumstances, such as if the hiring supervisor expected to have minimal contact with the applicant. The court's research disclosed not a single case in any circuit in which the plaintiff had presented sufficient circumstantial evidence to survive summary judgment, but lost due to the same-actor inference.¹⁵² The reason no such case appeared on the record, the court concluded, was that the same-actor inference is not evidence of nondiscrimination, but merely a shorthand means of describing the plaintiff's failure to make a sufficient evidentiary showing to warrant a trial on the merits.¹⁵³

146. See *id.* (Rovner, J., dissenting).

147. *Id.* at 369. Judge Rovner expressed her distress at the majority's citation of her opinion in *Venters v. City of Delphi*, 123 F.3d 956, 973 (7th Cir. 1997), which she stated did *not* stand for the proposition that generalized remarks do not constitute direct evidence of discrimination. See *Indurante*, 160 F.3d at 369 n.1.

148. 170 F.3d 734, 744 (7th Cir. 1999).

149. See *id.* at 737-38.

150. See *id.* at 744.

151. *Id.* at 744-45.

152. See *id.* at 745.

153. See *id.*

The magistrate judge had also taken note of the fact that, in this case, the "same actor" was Hispanic and, as a minority, would be less likely to discriminate against a fellow protected class member.¹⁵⁴ The Seventh Circuit rejected such a rule as absurd, and expressed skepticism even about the more limited assumption that members of the same race would be disinclined to discriminate against each other. Broad generalizations such as these, the court concluded, are of little use in analyzing whether a plaintiff has met her evidentiary burdens.¹⁵⁵ The court remanded for trial on the claim of racial discrimination.¹⁵⁶

Just as plaintiffs claiming pretext face an uphill battle, so do plaintiffs who claim discrimination by the use of subjective selection criteria. In *Scott v. Parkview Memorial Hospital*,¹⁵⁷ the hospital implemented a social worker staff reduction by requiring all existing staff to reapply.¹⁵⁸ A panel of interviewers rated the candidates, and Scott's score of thirty-two fell below the passing score of thirty-nine.¹⁵⁹ He claimed discrimination based on sex and also based on age under the Age Discrimination in Employment Act, because younger women seemed to score higher.¹⁶⁰ The court, however, noted that the age differences were slight and that so few people were involved that the numbers could not be deemed significant.¹⁶¹

Scott failed to convince the court that the subjective interviewing process was a "smokescreen[] for bias" because the court noted that in many professions such processes are necessary.¹⁶² Therefore, the court held that, "[u]nless the evidence demonstrates that an open-ended process was used to evade statutory anti-discrimination rules, subjectivity cannot be condemned."¹⁶³ The court's proper inquiry is not whether the employment decision was correct or whether the judge would have followed the same process, but whether the defendant honestly asserted that protected class played no part in its decision. Scott failed to present evidence that could support a conclusion that the hospital's selection rationale was dishonest, so the court affirmed summary judgment for the employer.¹⁶⁴

D. "Same Transaction" Test for Compensatory Damage Cap

The Seventh Circuit addressed how to apply the \$300,000 Title VII

154. *Id.*

155. *See id.*

156. *See id.* at 746.

157. 175 F.3d 523 (7th Cir. 1999).

158. *See id.* at 524.

159. *See id.*

160. *See id.* at 524-25.

161. *See id.* at 525.

162. *Id.*

163. *Id.*

164. *See id.* at 526.

compensatory damage limit in *Smith v. Chicago School Reform Board of Trustees*.¹⁶⁵ Smith, a white high school teacher at a predominantly black school, claimed reverse discrimination based on a racially hostile atmosphere.¹⁶⁶ A jury awarded Smith over \$2 million, but the Seventh Circuit characterized the proceedings as a "kangaroo court."¹⁶⁷ The district judge, combining errors of law with abuse of discretion, reacted to ongoing discovery and pretrial order skirmishes between the parties by effectively ordering the trial to go forward with evidence restricted to the plaintiff's version of events.¹⁶⁸ The Seventh Circuit held that the judgment could not stand, but went on to address potential damages.¹⁶⁹

Plaintiff Smith, who transferred to a different school two times, claimed that she encountered discrimination at each of the three schools at which she taught. She sought damages of \$300,000 per school.¹⁷⁰ The court looked to the plain language of the statutory recovery provision, which is stated as a single-party, not a single-claim, limit. "The unit of accounting," Judge Easterbrook stated, "is the litigant, not the legal theory."¹⁷¹ The court also considered the perverse result if the limit was per claim; litigants might file multiple suits or, if stymied by claim preclusion, engage in creative pleading in pursuit of multiple awards.¹⁷² If each racial slur could support an additional \$300,000 award, the cap is pointless. The best approach, the court concluded, was a "same-transaction rule" borrowed from the law of preclusion.¹⁷³ Under such a rule, persons victimized multiple times could recover more than those injured only once. On the other hand, a single compensable incident might encompass multiple offensive acts. The court did not go on to apply this new standard to the facts of the case, leaving the issue for resolution on remand.¹⁷⁴

II. AMERICANS WITH DISABILITIES ACT

A. Notable U.S. Supreme Court Decisions

The biggest Americans With Disabilities Act (ADA) news of the survey period was the U.S. Supreme Court's holding in both *Sutton v. United Air Lines, Inc.*¹⁷⁵ and *Murphy v. United Parcel Service, Inc.*¹⁷⁶ that, in determining whether

165. 165 F.3d 1142, 1149 (7th Cir. 1999).

166. See *id.* at 1144.

167. *Id.*

168. See *id.* at 1144-45.

169. See *id.* at 1148-49.

170. See *id.* at 1149-50.

171. *Id.* at 1150.

172. See *id.*

173. *Id.* at 1151.

174. See *id.*

175. 119 S. Ct. 2139 (1999).

176. 119 S. Ct. 2133 (1999).

a person has a disability under the ADA, mitigating measures must be considered.¹⁷⁷ Therefore, the proper analysis is whether the person is substantially limited in a major life activity when using a mitigating measure such as medication, corrective lenses, a prosthesis, or a hearing aid.¹⁷⁸ The Court extended this approach in *Albertson's, Inc. v. Kirkingburg*¹⁷⁹ to persons who have developed compensating behaviors that mitigate the effects of any impairment.¹⁸⁰ These decisions rejected the Equal Employment Opportunity Commission's (EEOC's) position that such mitigating measures should be disregarded in determining whether a claimant falls within the ADA's protection.

The U.S. Supreme Court also, in *Cleveland v. Policy Management Systems Corp.*,¹⁸¹ held that persons who apply for and receive social security disability benefits are not automatically estopped from pursuing ADA claims.¹⁸² Neither may courts strongly presume against benefit recipients' success on ADA claims. However, such recipients must explain why the contentions supporting the disability benefits are consistent with their assertions that they were qualified to perform the essential functions of their previous positions with or without reasonable accommodation, in order to survive summary judgment.¹⁸³

B. Absenteeism Versus Disability as the Cause of Adverse Action

The Seventh Circuit also addressed several substantial ADA issues during the survey period. In *Foster v. Arthur Andersen, LLP*,¹⁸⁴ the court affirmed summary judgment for the employer.¹⁸⁵ Foster, a word processing specialist, was on final warning for insubordination and had been also warned that she was subject to termination if her attitude and performance showed no improvement. Two days after a counseling session at which Foster's final warning status was discussed, Foster arrived at work five minutes late wearing a splint on her hand.¹⁸⁶ Her supervisor asked if the splint was for carpal tunnel syndrome ("CTS"), and Foster said that she only had tendinitis. Foster did not ask for any accommodation despite the fact that she spent over ninety percent of her work day typing.¹⁸⁷ A month later, Foster was again late for work due to a doctor's appointment that ran longer than expected, and failed to call to inform her supervisor within the required thirty minutes of her scheduled work time. When Foster did arrive at work following the appointment, she presented a doctor's

177. See *Sutton*, 119 S. Ct. at 2145; *Murphy*, 119 S. Ct. at 2137.
178. See *Sutton*, 119 S. Ct. at 2149; *Murphy*, 119 S. Ct. at 2137.
179. 119 S. Ct. 2162 (1999).
180. See *id.* at 2169.
181. 526 U.S. 795 (1999).
182. See *id.* at 797.
183. See *id.* at 798.
184. 168 F.3d 1029 (7th Cir. 1999).
185. See *id.* at 1036.
186. See *id.* at 1031.
187. See *id.*

note recommending a light duty assignment. Her injury was still diagnosed as tendinitis, although it was later identified as CTS.¹⁸⁸ Despite Foster's claim that her call was no more than six minutes late, she was terminated for failure to comply with work rules.¹⁸⁹

The key issue became whether Foster was discharged "because of disability" so that she was protected under the ADA.¹⁹⁰ In interpreting this provision, the court looked to the Civil Rights Act of 1991 ("CRA 1991"), which covers other types of employment discrimination, but not disability discrimination. The statute was analogous, the court reasoned, because both Title VII, which was amended by CRA 1991, and the ADA use similar "because of" language.¹⁹¹ CRA 1991 states that if the impermissible condition is "a motivating factor" in an employment decision, the statute has been violated. Other circuits had applied the "motivating factor" standard in ADA cases.¹⁹² Under this standard, if the disability contributes in a significant way to the adverse employment action, an ADA violation has occurred.¹⁹³

Here, Foster argued that the brief time period between her notice of tendinitis and her termination a day later was enough to create a triable issue on whether her request for an accommodation caused her termination. Although the court agreed that suspicious timing could be persuasive indirect evidence of discrimination, timing alone is not enough. Foster failed to otherwise link her tendinitis to her termination, and she lost on summary judgment.¹⁹⁴

Absenteeism and CTS also led to an ADA claim in *Murphy v. ITT Educational Services, Inc.*,¹⁹⁵ in which a divided panel affirmed summary judgment for the employer.¹⁹⁶ Murphy, a telemarketer, worked on a flexible part-time basis, and more than one-third of the time failed to work her required minimum seventeen hours per week for reasons unrelated to her CTS.¹⁹⁷ Although Murphy's CTS was common knowledge at work, it did not affect her work, nor did she request any accommodation. Murphy resigned to accept a position with another company, but then learned of a potential promotion at ITT and withdrew her resignation. Murphy's final interviewer spoke with human resources personnel prior to the interview, because he was aware that Murphy had a disability and he had not interviewed a disabled candidate since the ADA went into effect.¹⁹⁸ This interviewer, who was the sole decisionmaker, ultimately eliminated Murphy from consideration for the promotion based on Murphy's

188. *See id.*

189. *See id.* at 1031-32.

190. *Id.* at 1034.

191. *Id.* at 1033.

192. *Id.*

193. *See id.* at 1033-34.

194. *See id.* at 1034.

195. 176 F.3d 934 (7th Cir. 1999).

196. *See id.* at 939.

197. *See id.* at 935-36.

198. *See id.* at 936.

poor attendance record.¹⁹⁹

Murphy focused on the interviewer's awareness of her disability and his inquiry about it, but the court found that the inquiry was no more than an expression of concern for conducting the interview properly. If such inquiries violated the ADA, the court noted, employers would lose whether or not they had tried to do the right thing.²⁰⁰ The majority therefore found no triable issue, even though the plaintiff's attendance problems had always been excused in her telemarketing position, because such attendance habits could make the plaintiff a poor fit for the outside sales representative position.²⁰¹

Judge Ripple, dissenting, took a different view of the facts. He noted that Murphy had met the attendance expectations of the telemarketing position and, by working more than the required hours in some weeks, averaged more than the minimum over the entire work period.²⁰² The decisionmaker had admittedly expressed concern to another interviewer about Murphy's disability, which led the second interviewer to suggest to Murphy that Murphy write a letter explaining why her disability did not present a hiring risk.²⁰³ Also, the second interviewer allegedly told Murphy that Murphy was denied the promotion because of the disability. Although the majority dismissed this evidence as speculation by a non-decisionmaker, Judge Ripple gave it greater credence.²⁰⁴ Taken together, Judge Ripple believed, this evidence created a triable issue of fact.²⁰⁵

Absenteeism was again the central issue in *Waggoner v. Olin Corp.*²⁰⁶ The plaintiff, who suffered disabling "visual disturbances," began work for Olin in June 1994.²⁰⁷ In January 1995, she took a two-week medical leave for psoriasis. In May 1995, she began a five and a half month medical leave because of the visual disturbances. In the fourteen months that Waggoner worked for Olin, not counting the leaves, she was late or absent forty other times. Olin terminated Waggoner for poor attendance; Waggoner claimed that the discharge was due to her disability.²⁰⁸

The court framed the issue as at what point a request for disability-related time off work crosses the reasonable accommodation line. Waggoner, the court believed, was asking that the ADA assure her a job but not require that she perform it on a regular basis. However, "in most instances the ADA does not protect persons who have erratic, unexplained absences, even when those absences are the result of a disability. The fact is that in most cases, attendance

199. *See id.* at 937.

200. *See id.* at 938.

201. *See id.* at 939.

202. *See id.* at 940-41 (Ripple, J., dissenting).

203. *See id.* at 939-40.

204. *See id.* at 940.

205. *See id.* at 941.

206. 169 F.3d 481 (7th Cir. 1999).

207. *See id.* at 482.

208. *See id.*

at the job site is a basic requirement of most jobs."²⁰⁹ The court went on to say that it was not establishing a bright-line rule that time off work need never be tolerated; in some cases a reasonable accommodation might even be a part-time work schedule. However, Waggoner asked too much when she sought license to miss work at any time, for any duration.²¹⁰ A plaintiff with such an erratic pattern of absenteeism is not a "qualified individual with a disability" under the ADA, and an open-ended request for time off goes beyond a reasonable accommodation.²¹¹ Therefore, the court affirmed summary judgment for the employer.²¹²

C. *The ADA and the Collateral Source Rule*

The Seventh Circuit addressed some narrower issues under the ADA as well. In *Flowers v. Komatsu Mining Systems, Inc.*,²¹³ a jury found in favor of an ADA plaintiff who had received social security disability payments after he was terminated from employment.²¹⁴ In determining damages, the court applied the collateral source rule and determined that such payments could be set off against back pay awarded for the period during which the plaintiff was a qualified person with a disability.²¹⁵

D. *No ADA Right to "Bump" Into an Occupied Position*

In *Pond v. Michelin North America, Inc.*,²¹⁶ a disabled employee, as defined under the ADA, sought the accommodation of "bumping" another employee from a position as she was entitled to do under the collective bargaining agreement.²¹⁷ Rather than relying on her rights under the union contract, the employee argued that the position should be considered vacant for ADA purposes.²¹⁸ The court reviewed the baseline ADA standard that the ADA does not override bona fide seniority rights, so that bumping a more senior employee is not a reasonable accommodation. It concluded that the same "no bumping" standard should apply to less senior employees as well, although the plaintiff could still pursue her rights under the collective bargaining agreement in the proper forum.²¹⁹

209. *Id.* at 484.

210. *See id.* at 485.

211. *Id.* at 482, 485.

212. *See id.* at 485.

213. 165 F.3d 554 (7th Cir. 1999).

214. *See id.* at 555-56.

215. *See id.* at 556.

216. 183 F.3d 592 (7th Cir. 1999).

217. *Id.* at 594.

218. *See id.* at 595.

219. *Id.* at 596.

E. Attorney Fee Awards for Frivolous Claims

The case of *Adkins v. Briggs & Stratton Corp.*²²⁰ is a cautionary tale for plaintiff's counsel. Plaintiff Adkins, who suffered from narcolepsy, was caught sleeping at the wheel of his forklift.²²¹ Adkins admitted that his employer knew nothing of the narcolepsy, which was not diagnosed until four months after the incident. Nevertheless, Adkins pursued an ADA suit, which was dismissed for failure to state a claim, whereupon the employer sought attorney fees, which the trial court denied. The Seventh Circuit noted that employers are only entitled to attorney fees for suits brought in bad faith or that are frivolous, unreasonable, or lacking in foundation.²²² But here, the court said, "[n]o matter how you slice it, Adkins' claim was frivolous."²²³ Further, the same standard of frivolousness applies for motions to dismiss and motions for attorney fees.²²⁴ Still, the award of fees is discretionary, and the court remanded for reconsideration of the motion for fees in light of its holding that "[a] district court cannot . . . backpedal from a frivolous finding on a motion to dismiss to avoid imposing fees."²²⁵

III. AGE DISCRIMINATION IN EMPLOYMENT ACT

A. Subjective Interviewing Processes

A divided Seventh Circuit panel reversed a jury verdict for an age discrimination plaintiff in *Diettrich v. Northwest Airlines, Inc.*²²⁶ Northwest Airlines reorganized its sales force and required all its salespersons to formally re-apply and undergo personal interviews.²²⁷ Diettrich, at age fifty-three, was the oldest of the twelve candidates interviewed, although one candidate was fifty-two and another was fifty-one. The untrained interviewer was looking for "aggressive, results-oriented people who understood the critical situation" facing the airline.²²⁸ Diettrich was the first to interview, and because the interviewer was still developing his interviewing style, faced questions that were different from those posed to later interviewees.²²⁹ His thirty-minute interview was also ten minutes briefer than the other interviews. Diettrich scored lowest of the twelve candidates, and the fifty-two-year-old and fifty-one-year-old were second and third lowest, respectively.²³⁰ The youngest candidate, age twenty-eight, got

220. 159 F.3d 306 (7th Cir. 1998).

221. *See id.* at 307.

222. *See id.*

223. *Id.*

224. *See id.*

225. *Id.* at 307-08.

226. 168 F.3d 961 (7th Cir.), *cert. denied*, 120 S. Ct. 48 (1999).

227. *See id.* at 963.

228. *Id.*

229. *See id.*

230. *See id.*

the highest score.²³¹ All interviewees except Diettrich were rehired, and additional positions were filled with candidates from other departments and from outside the company.²³²

Based on this circumstantial evidence, a jury returned a verdict of age discrimination.²³³ The Seventh Circuit reversed, because "none of these flaws [in the selection process] has a hint of age bias to it."²³⁴ Further, "use of a subjective, even arbitrary, selection process is not proof of discrimination."²³⁵ The scoring pattern was equally unpersuasive to the court because a sample of twelve is too small to be statistically significant; the age-score correlation could have occurred by chance. Furthermore, two candidates of virtually the same age as the plaintiff received job offers, and the interviewer was unaware of the interviewees' ages, which made it unlikely that he singled out the eldest of the group for rejection.²³⁶

B. "Fungibility" Cases and the Plaintiff's *Prima Facie* Burden

In *Miller v. Borden, Inc.*,²³⁷ the Seventh Circuit clarified the plaintiff's burden in a "fungibility" situation, in which a plaintiff is terminated and is not replaced but her job duties are reassigned to younger employees.²³⁸ Plaintiff Miller, a fifty-seven-year-old sales representative, was terminated and his sales accounts divvied up between two younger employees, ages forty-seven and forty-three, one of whom had a substandard performance record.²³⁹ Borden admitted that Miller's performance was not the basis of discharge, but said that his territory was eliminated because it had lost its viability.²⁴⁰

231. See *id.* at 966.

232. See *id.* at 964.

233. See *id.*

234. *Id.* at 966.

235. *Id.* (citing *Richter v. Hook-SuperX, Inc.*, 142 F.3d 1024, 1031-32 (7th Cir. 1998); *Vitug v. Multistate Tax Comm'n*, 88 F.3d 506, 515 (7th Cir. 1996)).

236. See *id.* While the court reversed the jury verdict in favor of the plaintiff, the court also sharply criticized Northwest Airlines' counsel for breaching professional ethics. The district court gave Northwest permission to conduct informal juror interviews after the verdict was returned for feedback on the effectiveness of particular trial techniques. However, Northwest used this information in support of a motion to overturn the verdict, conduct the court characterized as "clearly out of bounds." *Id.* at 964. The Seventh Circuit declined to affirm the verdict as a sanction for the misconduct because the plaintiff was not prejudiced by the breach, but urged the district court, which had limited its reaction to critical comments, to reconsider harsher action. It also instructed its own court clerk to send a copy of its opinion to Wisconsin's professional responsibility board. See *id.* at 965. Judge Flaum dissented, finding the condemnation embodied in the two court opinions sufficient. See *id.* at 966-67 (Flaum, J., dissenting).

237. 168 F.3d 308 (7th Cir. 1999).

238. *Id.* at 313.

239. See *id.* at 310-11.

240. See *id.* at 311.

Generally, an Age Discrimination in Employment Act (ADEA) plaintiff must show that (1) he was age forty or over; (2) he was meeting legitimate performance expectations; (3) he was discharged or demoted; and (4) the employer sought a younger replacement. The fourth element changes if the discharge involved a restructuring in which the discharged employee's responsibilities were assumed by other employees.²⁴¹ In such cases, "the inference of discrimination [] is premised on some degree of fungibility between the terminated employee's job and the younger employee's job."²⁴² Therefore, a "fungibility" plaintiff need only show that she was treated unfavorably compared to a similarly situated younger employee. An employer who fires a forty-plus employee and hires or retains younger employees for positions for which the former employee was qualified, therefore, bears the burden of explaining its actions. Although the younger employees need not be under forty, they must be significantly (at least ten years) younger than the plaintiff.²⁴³

Here, the district court had found the younger employees who assumed Miller's accounts not similarly situated because their geographic territories were not identical to Miller's. The Seventh Circuit took a different view, focusing instead on the fact that Miller's \$1 million in accounts had been divided between younger sales staff in the same general region.²⁴⁴ It was enough that Miller showed that his responsibilities had been absorbed by younger employees; he did not have to show that a single salesperson took over his entire geographic territory, including all of his former accounts.²⁴⁵ Therefore, the panel reversed summary judgment for the employer and remanded for trial.²⁴⁶

C. Pregnancy Discrimination Act

Two facially similar cases under the Pregnancy Discrimination Act ("PDA") resulted in different outcomes during the survey period. In *Marshall v. American Hospital Ass'n*,²⁴⁷ plaintiff Marshall was hired to work in a marketing and public relations capacity by a health care society, although she had no health care experience.²⁴⁸ In Marshall's interview, the society director emphasized the importance of a conference held each September by the society, which generated forty percent of the society's annual revenue. Marshall, if hired, would be responsible for much of the conference organization.²⁴⁹ Marshall knew when she interviewed that she was pregnant and due to deliver in June, but did not disclose

241. See *id.* at 313.

242. *Id.* (quoting *Gadsby v. Norwalk Furniture Corp.*, 71 F.3d 1324, 1331 (7th Cir. 1995) (footnote omitted)).

243. See *id.*

244. See *id.* at 314.

245. See *id.*

246. See *id.* at 315.

247. 157 F.3d 520 (7th Cir. 1998).

248. See *id.* at 522.

249. See *id.*

her pregnancy.²⁵⁰

Marshall got the job and began work in December. Two weeks after starting, she told the director that she was due to have a baby in June, and that she planned to take eight weeks off after giving birth. The director expressed concern about the effect on the conference, and indicated that another finalist for the position had not had "this issue."²⁵¹ Shortly thereafter, the director asked Marshall to draft a couple of letters and was displeased with the results.²⁵² A society associate director wrote a memo to the director documenting concerns about Marshall's progress in booking speakers for the conference and her relationship with others working on the project. In early February, the society fired Marshall for the stated reason that Marshall's health care inexperience made her unable to perform satisfactorily.²⁵³

The court discussed three types of circumstantial evidence that a PDA plaintiff may offer as direct proof of pregnancy discrimination:²⁵⁴ first, suspicious timing or ambiguous statements or behavior that create an inference of discriminatory intent; second, evidence of systematically better treatment for similarly situated but non-pregnant employees; third, evidence that the plaintiff was qualified for a position but passed over for a non-pregnant employee, for stated reasons that lack credibility.²⁵⁵ Marshall relied on the first approach, pointing out that her performance issues all arose after her pregnancy disclosure, and concluding that the disclosure was responsible for the director's abrupt change in attitude.²⁵⁶

The court, however, was not persuaded. Marshall not only announced a pregnancy, but also indicated that she was planning a two-month leave during the most critical time of year for the organization. Furthermore, the director who hired Marshall was aware that Marshall was trying to become pregnant, although the director did not expect an imminent delivery. Therefore, the court found, the timing of events alone was not sufficient for the plaintiff's case to survive summary judgment. The court discounted the statements the director made when she learned of Marshall's pregnancy because they were not contemporaneous with the discharge and Marshall failed to demonstrate a causal relationship.²⁵⁷

Marshall was equally unsuccessful in arguing that the stated reason for her discharge, lack of health care experience, was pretextual because the director knew of that shortcoming when she hired Marshall. The court noted that Marshall had offered assurances that she would learn the field quickly, and that Marshall had offered no evidence that she had in fact come up to speed as rapidly as promised. Overall, the court concluded, Marshall failed to show that she was

250. *See id.* at 522-23.

251. *Id.* at 523.

252. *See id.* at 523-24.

253. *See id.* at 524.

254. *See id.* at 525 (citing *Troupe v. May Dep't Stores*, 20 F.3d 734, 736 (7th Cir. 1994)).

255. *See id.*

256. *See id.*

257. *See id.* at 526.

fired because she was pregnant, rather than because she was planning an extended leave during the organization's busiest work period while still in her first year of employment.²⁵⁸

In *Maldonado v. U.S. Bank*,²⁵⁹ a different panel of judges focused on a fairly subtle distinction and reached an opposite conclusion from the *Marshall* court based upon apparently similar facts. Maldonado applied for a part-time teller position at the bank, and learned in her February 1997 interview that part-timers filled in for absent full-time tellers, particularly during summer vacation months.²⁶⁰ Three days after the interview, Maldonado learned she was pregnant and due to deliver in July, but did not pass the information along to her prospective employer. On February 20, she began teller training and received a manual that specifically stated that employees were probationary for the first three months, and that a year's service was required for pregnancy leave. On March 3, Maldonado told her supervisor about the pregnancy. The next day, Maldonado was fired.²⁶¹ Maldonado claimed that she was told that she was terminated because of her "condition" in that the bank needed someone to work the entire summer.²⁶²

The court began with the premise that an employer cannot discriminate based on an assumption that pregnancy will prevent an employee from fulfilling her job responsibilities.²⁶³ On the other hand, women claiming pregnancy discrimination bear the burden of showing that they were treated differently because of pregnancy, i.e., that pregnancy was a motivating factor for the adverse employment decision. PDA plaintiffs may offer direct proof that is incriminating itself or indirect proof that eliminates other plausible and legitimate motives for the adverse employment action.²⁶⁴

The bank did not deny that it terminated Maldonado because of her pregnancy. The court's concern was that Maldonado was not fired for excessive absenteeism, which is permissible, but for anticipated absenteeism related to her pregnancy.²⁶⁵ Anticipatory adverse action might, the court noted, be allowable in some narrow circumstances, but only if the employer has "a good faith basis, supported by sufficiently strong evidence, that the normal inconveniences of an employee's pregnancy will require special treatment."²⁶⁶

Here, the court held, such a good faith basis was lacking.²⁶⁷ Maldonado's supervisor did not discuss Maldonado's ability to work through her pregnancy prior to the termination, and Maldonado had asked for neither leave nor special

258. See *id.* at 527.

259. 186 F.3d 759 (7th Cir. 1999).

260. See *id.* at 764.

261. See *id.*

262. *Id.* at 765.

263. See *id.* at 761.

264. See *id.* at 763.

265. See *id.* at 766.

266. *Id.* at 767.

267. See *id.*

treatment. In fact, Maldonado indicated that she intended to work up until her delivery and might not even carry the fetus to term.²⁶⁸ The court distinguished Maldonado's situation from that of the plaintiff in *Marshall*, who asked for special treatment.²⁶⁹ Therefore, the court reversed summary judgment for the employer based on the genuine issue of material fact regarding the reason for Maldonado's termination.²⁷⁰

IV. FAMILY & MEDICAL LEAVE ACT

The most significant Family & Medical Leave Act (FMLA) case during the survey period was *Haefling v. United Parcel Service, Inc.*,²⁷¹ in which the Seventh Circuit held that the FMLA definition of "serious health condition" as one that requires absence for "more than three calendar days" means three consecutive days.²⁷² UPS terminated Haefling, a driver, for excessive absenteeism.²⁷³ Ten months earlier, Haefling's car had been rear-ended by a dump truck and he had suffered a neck injury. UPS attendance records showed that Haefling missed thirty-two days out of 257 scheduled days; Haefling attributed nine of the absences to his neck injury.²⁷⁴

The court looked to the FMLA's purpose, which was to cover serious illnesses lasting more than a few days. It considered unlikely the possibility "that Congress intended to elevate minor illnesses lasting a day or two to the stuff of federal litigation."²⁷⁵ Therefore, FMLA plaintiffs must offer proof of incapacity spanning more than three consecutive calendar days.²⁷⁶ Haefling failed to do so, or even to offer adequate proof that he suffered from a "serious health condition" as defined under the FMLA.²⁷⁷

V. FAIR LABOR STANDARDS ACT

A. Compensation for On-Call Time

Two survey period cases dealt with the ongoing issue of compensation for on-call time. In *DeBraska v. City of Milwaukee*,²⁷⁸ the City implemented a policy that required police officers who were off work for illness or injury to remain at home unless granted permission to go out for purposes such as seeing a doctor,

268. See *id.* at 767-68.

269. See *id.* at 767.

270. See *id.* at 768.

271. 169 F.3d 494 (7th Cir.), *cert. denied*, 120 S. Ct. 64 (1999).

272. *Id.* at 499.

273. See *id.* at 495.

274. See *id.* at 496-97.

275. *Id.* at 499.

276. See *id.*

277. *Id.* at 500.

278. 189 F.3d 650 (7th Cir. 1999).

buying groceries, or attending religious services.²⁷⁹ Nearly 1900 officers sued, claiming that because their activities were severely restricted, the time at home should be compensated as "on call" time.²⁸⁰ With straight pay for the normal eight-hour work day, and time and one-half for the remaining sixteen hours of the day, the officers sought thirty-two hours of pay for each day of sick leave, and even more on weekends.²⁸¹

Judge Easterbrook, writing for a unanimous panel, quickly disposed of the plaintiffs' claim, on the basis that an officer who is sick or injured is not fit for work and therefore is not "engaged to wait" for a work assignment.²⁸² He went on to impliedly endorse the policy itself, stating that "[i]t is the physical limitations that confine the officer to home; all the Police Department does is demand that officers end their leave, and come back to work, when they are at last able and eager to roam about like healthy people."²⁸³

A group of emergency medical technicians ("EMTs") were equally unsuccessful in persuading Judge Easterbrook in *Dinges v. Sacred Heart St. Mary's Hospitals, Inc.*²⁸⁴ The EMTs, who received \$2.25 per hour of on-call time, were required to arrive at the hospital within seven minutes of receiving a page. The EMTs averaged one call to work every other fourteen to sixteen hour on-call period.²⁸⁵

Although the EMTs argued that a seven-minute response time was less time than any appellate court had found sufficient to allow "effective" use of time for personal pursuits, Judge Easterbrook did not find the response time dispositive.²⁸⁶ He noted that the entire city where the hospital was located was within a seven-minute radius of the hospital, so that the EMTs could spend their on-call time at home or elsewhere around the community. The EMTs focused on restricted activities, such as using a noisy lawn mower whose sound would drown out a page; attending concerts at which pagers were prohibited; and shopping outside the city.²⁸⁷ The hospital emphasized available activities such as cooking, eating, sleeping, exercising, doing housework, and attending children's sports activities.²⁸⁸ Overall, Judge Easterbrook concluded, although seven minutes might be a minimum, it was enough given the facts of the case to allow effective use of the on-call time for personal activities.²⁸⁹

In his analysis, Judge Easterbrook characteristically focused on the deal the parties had struck. In close cases, he said, private arrangements should be

279. See *id.* at 651.

280. *Id.*

281. See *id.*

282. *Id.* at 652.

283. *Id.*

284. 164 F.3d 1056 (7th Cir. 1999).

285. See *id.* at 1057.

286. *Id.* at 1058.

287. See *id.* at 1057.

288. See *id.* at 1058.

289. See *id.* at 1059.

enforced.²⁹⁰ Further, if the EMTs were treated as working while on-call, and therefore eligible for full pay, the hospital would logically react by eliminating the on-call program and hiring additional EMTs to be on the premises at all times, to eliminate premium overtime pay. The hospital would incur higher costs as a result, but EMTs like the plaintiffs would either receive less pay or spend more hours at the hospital, so both sides would be less well off.²⁹¹ The Fair Labor Standards Act (FLSA), Judge Easterbrook concluded, does not require such an inefficient result.²⁹²

Police officers also brought suit in *DiGiore v. Ryan*,²⁹³ which centered on the general principle that the FLSA does not allow exempt employees' pay to be "docked" for partial day absences, work rule violations, or other reasons related to work quality or quantity.²⁹⁴ The Illinois State Police Department had accident, physical fitness, and disciplinary policies that applied to both exempt and non-exempt employees, and that allowed discretionary suspensions without pay.²⁹⁵ The plaintiffs pointed to five instances from 1989 through 1991 in which exempt employees been suspended without pay, including some split-week suspensions. In 1997, prior to the suit, the Department had determined that its actions had been improper, and compensated the officers for the lost pay.²⁹⁶

The court held that a general policy that creates a theoretical possibility of impermissible pay deduction does not violate the exemption standards of the FLSA. An employee must either show an actual practice of deduction or a policy that creates a "significant likelihood" of improper salary deductions by "effectively communicat[ing] that deductions will be made in specified circumstances."²⁹⁷ Here, the policies at issue applied to all Department employees, but the Department had a review procedure to ensure that application of the policies to individual situations complied with the FLSA.²⁹⁸ Furthermore, the five improper deductions fell short of an actual practice of improper salary deductions and, even if they had risen to that level, they were rectified within the "window of correction" allowed under the FLSA.²⁹⁹ Thus, the court affirmed summary judgment for the Department.³⁰⁰

290. *See id.*

291. *See id.*

292. *See id.*

293. 172 F.3d 454 (7th Cir. 1999).

294. *Id.* at 462.

295. *See id.* at 457-58.

296. *See id.* at 458.

297. *Id.* at 462 (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

298. *See id.* at 463.

299. *Id.* at 464.

300. *See id.* at 467.

B. Gross Revenue Test Inapplicable to Retaliation Claims

In *Sapperstein v. Hager*,³⁰¹ the court held that an employee may bring a retaliation claim under the FLSA even if the employer's gross revenues fall below the jurisdictional minimum of \$500,000.³⁰² Plaintiff Sapperstein, a mechanic, reported his employer to the Illinois Department of Labor for allegedly violating state and federal child labor and minimum wage laws.³⁰³ The business's manager filed an affidavit stating that gross annual sales for the relevant year were \$497,253. The district court dismissed for lack of subject matter jurisdiction.³⁰⁴ A unanimous Seventh Circuit panel reversed, although it noted that factual determinations related to jurisdiction are usually afforded great deference.³⁰⁵ Here, however, the court found abuse of discretion in crediting the affidavit of a biased witness, without offering the plaintiff an opportunity to contest the assertion, particularly given how close the reported revenues were to the jurisdictional minimum.³⁰⁶

Furthermore, the court found an alternative basis for jurisdiction. The FLSA prohibits "any person" from discharging or discriminating against an employee for filing a complaint under the FLSA.³⁰⁷ Although "employer" is defined as an enterprise with at least \$500,000 in gross annual sales, there is no similar dollar requirement to qualify as a "person."³⁰⁸ Furthermore, corporations, as well as individual named defendants, fall within the definition of "persons."³⁰⁹ The FLSA does not require that the complaint result in a finding that the Act was actually violated; it is enough if the plaintiff believed in good faith that a violation might have occurred. Furthermore, the court held, filing a claim with a state's labor department qualifies as such a protected activity. Accordingly, the plaintiff's retaliation claim was remanded for trial.³¹⁰

C. Indiana Developments

Although most employment law developments occur at the federal level, the Indiana General Assembly did enact an employment-related statute during the survey period. The new law, which became effective July 1, 1999, limits the number of hours sixteen- and seventeen-year olds may work during school weeks.³¹¹ These teens may work only thirty hours per week.³¹² However, if the

301. 188 F.3d 852 (7th Cir. 1999).

302. *See id.* at 854-55.

303. *See id.* at 854.

304. *See id.* at 855.

305. *See id.* at 856 (citing *Olander v. Bucyrus-Erie Corp.*, 187 F.3d 599, 607 (7th Cir. 1999)).

306. *See id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *See id.* at 857.

311. *See* IND. CODE § 20-8.1-4-20 (Supp. 1999).

312. *See id.* § 20-8.1-4-20(f), (g).

employer has written permission from the child's parent or legal guardian, the child may be employed up to forty hours during a school week³¹³ and up to forty-eight hours in a non-school week.³¹⁴ Previously, no permission was required for work up to forty hours a week.³¹⁵

The law also clarified that sixteen- and seventeen-year-olds may not work past 10:00 p.m. on nights following a school day.³¹⁶ With permission, seventeen-year-olds may work until 11:30 p.m., and on two nonconsecutive school nights may work as late as 1:00 a.m.³¹⁷

During the survey period, the Indiana Supreme Court also contributed to the body of employment law when it decided a case that dealt with employer liability to employees of independent contractors. In *Carie v. PSI Energy, Inc.*,³¹⁸ PSI Energy ("PSI") had outsourced certain equipment maintenance to an independent contractor.³¹⁹ One task required the removal of a cover and attached fixture from a large piece of equipment, by means of a forklift. Plaintiff Carie was working on a crew assigned to this task, under the supervision of a foreman who knew that the cover was not self-supporting without the forklift. Another crew member removed the cover and fixture with a PSI forklift, but the forklift stalled and the foreman left to find a PSI employee to fix the forklift, telling his crew to "leave it alone, don't touch it."³²⁰

While the foreman was gone, PSI mechanics arrived and provided directions for driving the forklift without stalling.³²¹ Another forklift came along and needed to pass, and Carie's co-worker removed the forklift hooks from the cover and fixture so that he could back the forklift up and clear a passage.³²² The cover and fixture, left unsupported, fell over and seriously injured Carie and another co-worker.³²³

The court began with the general rule that employers are not liable for negligence by independent contractors whom they hire. However, Indiana recognizes five exceptions to this general rule, including the "due precaution" exception which comes into play if an act to be performed will probably result in injury to others absent due precautions.³²⁴ The essence of this exception, the court noted, is the foreseeability of a peculiar risk and the concomitant need for

313. See *id.* § 20-8.1-4-20(j).

314. See *id.* § 20-8.1-4-20(k).

315. See *It's Up to Parents: Draw the Line on Teen Work Hours*, S. BEND TRIB., Sept. 21, 1999, at A10.

316. See IND. CODE § 20-81-4-20(h).

317. See *id.* § 20-8.1-4-20 (l).

318. 715 N.E.2d 853 (Ind. 1999).

319. See *id.* at 854.

320. *Id.*

321. See *id.*

322. See *id.* at 854-55.

323. See *id.* at 855.

324. *Id.*

some special precautions.³²⁵ The question then became whether PSI should have foreseen that the maintenance task would probably result in the type of injury the plaintiffs suffered unless due precaution was taken. The court concluded that it was not foreseeable that a forklift would stall while moving the cover and fixture, and that an employee of the independent contractor would then move the forklift so as to leave the cover and fixture unsupported.³²⁶ Thus, a unanimous court reversed the court of appeals and affirmed the trial court's grant of summary judgment for PSI.³²⁷

D. Good Friday Holiday For State Employees

The Indiana Civil Liberties Union ("ICLU") took on Indiana's policy of giving state employees Good Friday off as a legal holiday in *Bridenbaugh v. O'Bannon*.³²⁸ The ICLU argued that the policy violated the Establishment Clause of the First Amendment to the U.S. Constitution.³²⁹ The Seventh Circuit upheld the policy.³³⁰

The ICLU argued that the practice, in effect since 1941, lacks any secular justification, and has the principal or primary effect of advancing religion.³³¹ The Attorney General's office responded that, because Lincoln's Birthday and Washington's Birthday have been moved by the governor and are thus observed by state employees on the day after Thanksgiving and the day before or after Christmas, Good Friday provides the only holiday for the four months between Martin Luther King, Jr.'s Birthday and Memorial Day. The valid secular justification, therefore, was providing a long spring weekend for state employees in order to boost their morale and productivity.³³² The State also submitted evidence that Good Friday makes sense; over thirty percent of Indiana schools are closed that day and forty-four percent of employers in a nine-state region, including Indiana, allow their employees the day off. Therefore, state employees are more likely to have children out of school and spouses off work that day.³³³ The court analogized the policy to previously-upheld Sunday closing laws; because the fact that the chosen day of rest coincides with a day of religious observance by most Christians does not render Sunday closing laws illegal.³³⁴ It also noted that, although there are few secular aspects to Good Friday, there are many secular aspects to Easter, so that a long Easter weekend is comparable to

325. See *id.* at 856.

326. See *id.* at 857.

327. See *id.* at 858.

328. 185 F.3d 796 (7th Cir. 1999), *cert. denied*, 120 S. Ct. 1267 (2000).

329. See *id.* at 796.

330. See *id.*

331. See *id.* at 797-98.

332. See *id.* at 797.

333. See *id.* at 799.

334. See *id.* at 800.

an extended holiday at Thanksgiving or Christmas.³³⁵

The ICLU argued that the holiday advances religion, and the court agreed that it made things easier for those employees wishing to attend religious services. However, the court noted that the same is true of Thanksgiving and Christmas, and the fact that the state practice harmonized with the tenets of certain religions does not violate the Establishment Clause.³³⁶ Furthermore, Indiana does not promote the religious aspects of the day, unlike its endorsement of Dr. Martin Luther King Jr.'s principles in connection with Martin Luther King Jr.'s Birthday. Thus, a divided panel affirmed that Indiana did not violate the Establishment Clause by giving its employees Good Friday off. Judge Fairchild dissented.³³⁷

VI. PROCEDURAL ISSUES, INCLUDING SOVEREIGN IMMUNITY

A. Sovereign Immunity

In June, 1999, the U.S. Supreme Court decided *Alden v. Maine*,³³⁸ in which a 5-4 majority held that, under the Eleventh Amendment, Congress lacked the power to subject the states to suit under the Fair Labor Standards Act ("FLSA") in either federal or state court.³³⁹ The petitioners, a group of probation officers, had sued the state of Maine in federal court claiming unpaid overtime wages under the FLSA.³⁴⁰ The court dismissed the case when the U.S. Supreme Court announced its decision in *Seminole Tribe of Florida v. Florida*,³⁴¹ holding that Congress lacks the power under Article I of the U.S. Constitution to abrogate the States' sovereign immunity from suits commenced or prosecuted in federal courts.³⁴² Following the dismissal, the probation officers brought suit in state court, but the suit was dismissed under the doctrine of sovereign immunity. The Court held that "the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts."³⁴³ Therefore, the petitioners had no

335. See *id.* at 801.

336. See *id.*

337. See *id.* at 802, 804 (Fairchild, J., dissenting) (arguing that Good Friday does not have the relevant attributes of Sundays, Christmas, and Thanksgiving in that "it is a day of solemn religious observance, and nothing else. . . ." (quoting *Metzl v. Leininger*, 57 F.3d 618, 620 (7th Cir. 1995))).

338. 119 S. Ct. 2240 (1999).

339. See *id.* at 2246.

340. See *id.*

341. 517 U.S. 44 (1996).

342. See *Alden*, 119 S. Ct. at 2246.

343. *Id.* More recently, in *Kimel v. Florida Board of Regents*, 120 S. Ct. 631 (2000), the Court reached a similar conclusion regarding the Age Discrimination in Employment Act. Although the ADEA contains clear language stating Congress' intent to abrogate the States' immunity, the abrogation was held ineffective because it exceeded Congress' Fourteenth

forum for their case and the States became effectively exempt from the provisions of the FLSA.

B. Enforceability of Arbitration Agreements

Two survey period cases dealt with the enforceability of arbitration agreements. In *Koveleskie v. SBC Capital Markets, Inc.*,³⁴⁴ the Seventh Circuit held that Title VII claims can be subject to mandatory arbitration.³⁴⁵ Koveleskie was a securities trader, and the securities exchanges with which she registered required that she agree to arbitrate disputes with her employer.³⁴⁶ She sought to invalidate that clause as a violation of Title VII, pointing to the Civil Rights Act of 1991 language which states that "[w]here appropriate and to the extent authorized by law, the use of alternative dispute resolution, including arbitration, is encouraged to resolve disputes arising under Title VII."³⁴⁷ Koveleskie argued that this language, in light of the relevant legislative history, did not authorize compelled arbitration of Title VII cases.³⁴⁸

The Seventh Circuit looked to Supreme Court precedent upholding involuntary arbitration of ADEA claims for securities traders and to the trend among circuits that had addressed the issue in the context of a Title VII claim.³⁴⁹ The panel concluded that it agreed with the majority of circuits, that Congress intended to encourage, and not to preclude, pre-dispute arbitration agreements.³⁵⁰

The court reached a consistent, although not unanimous, conclusion in *Michalski v. Circuit City Stores, Inc.*³⁵¹ After Title VII plaintiff Michalski had been employed for over a year, Circuit City asked all its employees to agree to binding arbitration of employment related disputes.³⁵² Employees had to sign a special form to opt out of the program, or were counted as having acquiesced. The district court held the agreement invalid for lack of consideration on Circuit City's part.³⁵³

The Seventh Circuit panel majority, however, viewed the opt-out agreement as significant, because the employee was free to decline mandatory arbitration. The majority found mutual consideration in Circuit City's reciprocal agreement to submit claims to arbitration.³⁵⁴ Because Michalski promised to arbitrate disputes in exchange for a promise of continued employment, and because both

Amendment authority. *See id.* at 637.

344. 167 F.3d 361 (7th Cir.), *cert. denied*, 120 S. Ct. 44 (1999).

345. *See id.* at 362.

346. *See id.* at 363.

347. *Id.* at 364.

348. *See id.*

349. *See id.* (citing, *inter alia*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)).

350. *See id.* at 365.

351. 177 F.3d 634 (7th Cir. 1999).

352. *See id.* at 635.

353. *See id.*

354. *See id.* at 636.

parties were bound by the agreement, the arbitration agreement was deemed enforceable.³⁵⁵

Judge Rovner dissented, focusing on the illusory nature of Circuit City's obligation.³⁵⁶ Nowhere, Judge Rovner noted, did the agreement and related documents clearly provide that Circuit City was bound to the same extent as its employees. Circuit City's Dispute Resolution Rules and Procedures stipulated that Circuit City retained the right to alter the terms and conditions of the program, or to terminate the agreement completely.³⁵⁷ Judge Rovner was also concerned that large national employers with significant arbitration experience might have some distinct advantages in the arbitration process. Characterizing the agreement as a "bait and switch" tactic affecting civil rights, she declined to join the majority in upholding the agreement.³⁵⁸

C. *The Few-Employees Exemption*

Another recurring issue in the Seventh Circuit was Title VII's definition of "employer." In *Komorowski v. Townline Mini-Mart and Restaurant*,³⁵⁹ the court focused on Title VII's inapplicability to employers of fewer than fifteen employees.³⁶⁰ Townline Mini-Mart ("Townline") fell below the fifteen-employee benchmark from March through August 1996, but from September 1996 on, it exceeded the threshold. The plaintiff was terminated in November 1996, allegedly in retaliation for complaining about sexual harassment that began in October 1996. She filed her complaint in January 1997.³⁶¹

Title VII defines "employer" as "ha[ving] fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year"³⁶² The plaintiff argued that, for new employers, the "current calendar year" should be the first full calendar year following the discriminatory act, or alternatively, the year the complaint was filed. Otherwise, she argued, new employers would have carte blanche to violate Title VII during the first year of operations.³⁶³ The district court disagreed, holding that "current calendar year" referred to the year in which the alleged discrimination occurred, so that the defendant was not an employer within the Title VII definition.³⁶⁴

The Seventh Circuit affirmed, noting as a threshold issue that a defendant's failure to meet the statutory definition of "employer" does not deprive a district court of subject matter jurisdiction. The plaintiff must, however, establish, along

355. See *id.* at 637.

356. See *id.* (Rovner, J., dissenting).

357. See *id.* at 638.

358. *Id.* at 639.

359. 162 F.3d 962 (7th Cir. 1998).

360. See *id.* at 964.

361. See *id.*

362. *Id.* at 965.

363. See *id.*

364. *Id.* at 964.

with the other statutory requirements, that the employer meets or exceeds the fifteen-employee threshold. The court then reviewed precedent and the plain language of Title VII, and agreed with the defendant that “current calendar year” is the year in which the alleged discrimination occurred.³⁶⁵

The “few-employees” exemption to Title VII, the ADA, and the ADEA was also the focus of *Papa v. Katy Industries, Inc.*³⁶⁶ The threshold for Title VII and the ADA is fifteen employees; for the ADEA it is twenty.³⁶⁷ Plaintiff Papa worked for Walsh Press Company, Inc. (“Walsh”), a wholly owned subsidiary of Katy Industries, Inc. (“Katy”). Walsh employed fewer than fifteen employees, although Katy and all its various subsidiaries employed over a thousand people. Katy ordered the reduction in the workforce that led to Papa’s termination. Katy set the salaries of Walsh employees. Walsh employees participated in Katy’s pension plan. Katy funded Walsh’s operations. Walsh’s computer operations were integrated with Katy’s. Walsh used a subaccount of Katy’s checking account. Walsh could not issue checks over \$5,000 without Katy’s approval. Based on all of these interrelationships, Papa argued, the affiliated group of corporations should be considered an integrated enterprise for purposes of applying the employee threshold.³⁶⁸

The Seventh Circuit opinion, written by Judge Posner, acknowledged a lack of clarity in the relevant standard. In revisiting the standard, Judge Posner started with a review of the purpose for the few-employee exemption, i.e. to spare small employers the potentially fatal expense and burden of compliance with anti-discrimination laws.³⁶⁹ This purpose is equally applicable, he stated, regardless of whether the small employer’s owner is a poor individual or a wealthy corporation; rich people, he noted “aren’t famous for wanting to throw good money after bad.”³⁷⁰ Therefore, treating all affiliated groups as single employers could destroy small firms, which Congress sought to avoid by means of the exemption.³⁷¹

Judge Posner noted only three situations in which the exemption should not be available.³⁷² The first is where traditional creditors could “pierce the corporate veil” due to neglect of formalities or holding out of the parent as the real party in interest.³⁷³ The second is where a corporation has fragmented itself expressly to avoid the anti-discrimination laws. The third is where the parent corporation actually directed the discriminatory act, practice, or policy, in which case the parent would itself be the violator. This approach, Judge Posner explained, offers the advantage of consistent principles regarding affiliate

365. *Id.*
366. 166 F.3d 937 (7th Cir.), *cert. denied*, 120 S. Ct. 526 (1999).
367. *See id.* at 939.
368. *See id.*
369. *See id.* at 940.
370. *Id.*
371. *See id.*
372. *See id.*
373. *Id.* at 940-41.

liability from statute to statute.³⁷⁴ It also eliminates an arbitrary distinction between a small affiliate that obtains legal and financial advice, systems support etc. from a parent corporation versus one that obtains such services from an independent contractor.³⁷⁵

Therefore, Judge Posner, and the rest of the panel, concluded that this new standard should supplant the "four factor test" applied by the parties, which focuses on interrelation of operations, common management, common ownership, and centralized control of labor relations and personnel.³⁷⁶ Applying the new standard, neither of the three special situations applied.³⁷⁷ Therefore, the court affirmed the district court holding that the plaintiff's employer fell below the employment thresholds for Title VII, the ADA, and the ADEA.³⁷⁸

*D. Defining the Limitations Period Following Receipt of EEOC
Right-to-Sue Letters*

In *Houston v. Sidley & Austin*,³⁷⁹ the focal issue was the ninety-day limitations period that begins with the plaintiff's receipt of a right-to-sue letter from the EEOC.³⁸⁰ Houston, a pro se plaintiff suing under Title VII, the ADA, and the ADEA, filed her charges as required with the EEOC. On May 27, 1998, the EEOC sent a right-to-sue letter via certified mail, telling Houston that she had ninety days from receipt of the letter to bring suit. The Post Office delivered the first notice of the letter to Houston's address on June 2, and a second on June 7. Houston picked up the letter on June 9, and filed suit on September 4, which was untimely if the limitations period had begun to run on June 6 or earlier.³⁸¹

Sidley & Austin argued that Houston acted unreasonably in waiting seven days from her first notice to pick up the letter. The district court agreed, and granted summary judgment for the employer.³⁸² The Seventh Circuit reviewed earlier cases in which it had held that the limitations period begins to run when a claimant receives actual notice of the right to sue. However, this actual notice rule is inapplicable to plaintiffs who do not receive actual notice through no fault of their own.³⁸³

Here, the first notice left by the Post Office informed Houston that she must pick her letter up by June 12, or it would be returned to the sender. She did so, and complied with the letter's requirement of filing suit within ninety days thereafter. The Seventh Circuit declined to examine Houston's reasons for not

374. See *id.* at 941.

375. See *id.* at 942.

376. *Id.* at 940.

377. See *id.* at 943.

378. See *id.* at 939, 943.

379. 185 F.3d 837 (7th Cir. 1999).

380. See *id.* at 838.

381. See *id.*

382. See *id.*

383. See *id.* at 839.

picking the letter up earlier, and adopted a bright-line rule that a plaintiff who picks up a certified right-to-sue letter within the time allowed by the Post Office presumptively has ninety days from actual receipt to file suit.³⁸⁴ his presumption is apparently quite strong because the court went on to say that it could not imagine any circumstances that would overcome it.³⁸⁵ The court therefore reversed the district court's grant of summary judgment.³⁸⁶

E. "Forensic Vocational Expert" Testimony

A creative form of expert testimony failed to survive judicial scrutiny in *Huey v. United Parcel Service, Inc.*³⁸⁷ Plaintiff Huey offered a letter from a "forensic vocational expert" who held a Ph.D. in human resource development, in support of Huey's claim that UPS had retaliated against him for claiming discrimination.³⁸⁸ Judge Easterbrook noted that the expert had done nothing beyond interviewing the plaintiff and reviewing documents received from the plaintiff's counsel. The expert provided no reasoning to support his conclusion that the plaintiff was a "victim of a retaliatory discharge by UPS for racially motivated reasons"³⁸⁹

Judge Easterbrook firmly stated that "[t]his will not do as the work of an expert."³⁹⁰ Experts must substantiate opinions offered; they may not merely state conclusions. Expertise, the judge noted, is necessary but not sufficient under Federal Rule of Evidence 702.³⁹¹ If this expert in fact possessed the requisite specialized skills, he failed to apply them, and a unanimous panel agreed that the district court was correct in excluding the testimony, and affirmed the jury verdict for the employer on the retaliation claim.³⁹²

F. Claim Preclusion and Virtual Representation

A final procedural issue of note was raised in *Tice v. American Airlines, Inc.*³⁹³ Federal Aviation Administration rules prohibit persons age sixty or older from piloting or copiloting commercial aircraft, but do not similarly restrict flight officers.³⁹⁴ American Airlines ("American") did not allow pilots who reached age sixty to downbid to flight officer positions because it used the flight officer position for pilot training, and therefore offered that position only to persons

384. See *id.* The Postal Service manual generally specifies a holding period of at least three and no more than 15 days. See *id.* at 840.

385. See *id.* at 839.

386. See *id.* at 840.

387. 165 F.3d 1084 (7th Cir. 1999).

388. *Id.* at 1086.

389. *Id.*

390. *Id.*

391. See *id.* at 1087.

392. See *id.*

393. 162 F.3d 966 (7th Cir. 1998), *cert. denied*, 119 S. Ct. 2395 (1999).

394. See *id.* at 968.

eligible to advance to a pilot position.³⁹⁵

American had, in previous suits, successfully defended this policy.³⁹⁶ In *Johnson v. American Airlines, Inc.*,³⁹⁷ brought by a group of twenty-two pilots under the ADEA, the up-or-out practice was upheld as a bona fide occupational qualification ("BFOQ").³⁹⁸ In *Murnane v. American Airlines, Inc.*,³⁹⁹ American's policy of not hiring anyone over age thirty as a flight officer was also upheld.⁴⁰⁰ Finally, *EEOC v. American Airlines, Inc.*,⁴⁰¹ was brought on behalf of a class of pilots ages forty and older, who were denied flight officer employment because they had too few remaining years to progress to pilot and serve the minimum number of years as a pilot to satisfy American's policy.⁴⁰² American argued that Tice and his co-plaintiffs were precluded from relitigating the issue, on the theory that they were "virtually represent[ed]" by the plaintiffs in these earlier suits.⁴⁰³

The Seventh Circuit, however, distinguished the interests of the Tice plaintiffs from the earlier plaintiffs. In *Murnane* and *EEOC*, the plaintiffs were suing because they were not hired; Tice was a current employee. Tice's complaint was about being forced into retirement because pilots age sixty or older could not downbid to flight officer, although pilots younger than age 60 were permitted and sometimes even required to do so. "Downbidding" was not raised as an issue in either *Murnane* or *EEOC*. Although the Tice claim was more comparable to *Johnson*, Tice could not have joined *Johnson* because at the time that case was brought, he was too young to qualify for the plaintiff class. In fact, his interests were contrary to those of the *Johnson* plaintiffs, because forcing out older workers could have created opportunities for younger workers such as, at that time, Tice.⁴⁰⁴

The court focused on the three requirements for claim preclusion: (1) a final judgment on the merits in an earlier suit, (2) an identity of cause of action, and (3) an identity of parties or privies. Here, the privity required under the third element depended on a virtual representation theory.⁴⁰⁵ Although virtual representation is a highly nebulous concept, it has rarely been used to deny plaintiffs their day in court.⁴⁰⁶ Circumstances that might qualify as virtual representation include control or participation in the earlier suit, acquiescence, deliberate manipulation to avoid preclusion, or a close relationship to a party to

395. See *id.* at 968-69.

396. See *id.* at 969.

397. 745 F.2d 988 (5th Cir. 1984).

398. See *Tice*, 162 F.3d at 969 (citing *Johnson*, 745 F.2d at 988).

399. 667 F.2d 98 (D.C. Cir. 1981).

400. See *Tice*, 162 F.3d at 969 (citing *Murnane*, 667 F.2d at 98).

401. 48 F.3d 164 (5th Cir. 1995).

402. See *Tice*, 162 F.3d at 969 (citing *EEOC*, 48 F.3d at 164).

403. *Id.* at 968.

404. See *id.* at 969.

405. See *id.* at 970.

406. See *id.* at 970-71.

the earlier suit.⁴⁰⁷ The court also noted that formal procedures for certifying classes could easily be circumvented if courts could create de facto class actions through a liberal application of virtual representation.⁴⁰⁸

Therefore, absent any formal successor interest, virtual representation requires first, that the later party was aware of the earlier litigation while it was going on and that the earlier litigation could foreclose his own claims, and also either actual participation by the later party or a duty to participate. Rights under the ADEA are individual, not group-based, as is clear from the language that “no employee shall be a party plaintiff to any action under it unless he gives his consent in writing”⁴⁰⁹ Here, there was no evidence of manipulation. Tice could not have participated in any of the earlier actions. Tice did not acquiesce to virtual representation. And, finally, Tice had no relationship with the earlier plaintiffs.⁴¹⁰ Thus, his claim was not precluded.⁴¹¹

CONCLUSION

Employment law continues to evolve, commanding an ever-increasing share of the federal caseload. Nebulous concepts such as hostile environment, reasonable accommodation and virtual representation provide much fodder for debate. The U.S. Supreme Court clarified an important aspect of the ADA when it held that mitigating measures are considered in deciding who is entitled to protection, but each year far more issues are raised than are resolved. Practitioners face continuing challenges in the years ahead in keeping abreast of the developing law.

407. See *id.* at 971.
408. See *id.* at 973.
409. *Id.* (quoting 29 U.S.C. § 216(b)).
410. See *id.* at 973-74.
411. See *id.* at 974.

RECENT DEVELOPMENTS IN INDIANA APPELLATE PROCEDURE: NEW APPELLATE RULES, A CONSTITUTIONAL AMENDMENT, AND A PROPOSAL

GEORGE T. PATTON, JR.*

The big story in 1999 for appellate practitioners is the new Indiana Rules of Appellate Procedure ("Rules") that become effective on January 1, 2001. Also on the horizon is the November 7, 2000 vote on the proposed amendment to the Indiana Constitution changing the jurisdiction of the Indiana Supreme Court. Perhaps related to the constitutional amendment, Chief Justice Randall T. Shepard has publicly supported expanding the membership of the Indiana Supreme Court from the current contingent of five justices. These potential changes raise a question about whether the Indiana Supreme Court should continue to require that a majority of justices (currently three of five) vote to grant transfer before deciding to hear a case. This process contrasts with the practice in the U.S. Supreme Court where a minority of four Justices can require the nine Justice Court to hear a case on the merits.

In light of the practical impact of the new Rules on all appellate practitioners, this Article will begin by discussing the Rules with an organization that parallels the structure of the new Rules. Although this Article is not meant to be the definitive historical review of the new Rules with comparisons and case citation to the old rules,¹ it discusses or at least briefly mentions all of the new Rules. This Article will discuss the proposed amendment to the Indiana Constitution, which would change the jurisdiction of the Indiana Supreme Court, to be voted on November 7, 2000, and Chief Justice Shepard's call to expand the Indiana Supreme Court. Finally, this Article will argue that the Indiana Supreme Court should change its practice regarding the number of votes needed to grant transfer, so that one vote less than a majority—like in the U.S. Supreme Court—would result in review on the merits by the state's court of last resort. A published opinion on the legal issue that has generated some interest will then be published, albeit a minority view.

I. THE NEW RULES

The Indiana State Bar Association's Appellate Practice Section proposed the

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1. For readers interested in such a study, see GEORGE T. PATTON, JR., 4A INDIANA PRACTICE: APPELLATE PROCEDURE (West Publishing Co., forthcoming Fall 2000).

new Rules to achieve a number of benefits such as: (1) reducing the expense of appeals; (2) shortening the time for processing an appeal; (3) decreasing the amount of paper lawyers produce and judges review; (4) improving access to the record for lawyers outside of Indianapolis; (5) codifying many of the unwritten practices that only some practitioners know; (6) developing rules in some areas where none now exist; (7) unifying deadlines for the benefit of the occasional appellate practitioners; (8) removing archaic language when possible; (9) making the rules easier to read and locate by separating the current rules into shorter rules with a comprehensive table of contents, a cross-reference table, definitions, and forms; and (10) saving time for all involved, including trial court clerks, court reporters, lawyers, and judges.² These goals drove the project to completion. Success in achieving these benefits, however, will depend upon lawyers across the state becoming familiar with the new Rules.

A summary of the Rules can be broken down into twelve general titles that track the organization of the new Rules: (1) scope, definitions, and forms; (2) jurisdiction; (3) initiation of appeal; (4) general provisions; (5) record on appeal; (6) motions; (7) briefs; (8) appendices; (9) oral argument; (10) petitions for rehearing; (11) supreme court proceedings; and (12) court procedures, powers, and decisions.

A. Title I: Scope, Definitions, and Forms

1. *Rule 1: Scope.*—The “Scope” of the new Rules is similar to the old rules, but contains an additional sentence that was not in the prior version: “The Court may, upon the motion of a party or the Court’s own motion, permit deviation from these Rules.”³ The Indiana Supreme Court previously had the inherent authority to permit deviation from the Rules, but the prior version did not expressly provide this power. This is an example of taking an unwritten practice and codifying it into a rule so that all lawyers are aware of the court practice.

2. *Rule 2: Definitions.*—The new Rules contain “Definitions,”⁴ which have no counterpart in the prior rules. The Definitions are intended to clarify terms used in the Rules that might be unfamiliar to the occasional appellate practitioner such as “Appellant’s Case Summary,”⁵ “Appendix,”⁶ “Clerk’s Record,”⁷ “Criminal Appeals,”⁸ and “Final Judgments,”⁹ among others. The Definitions are also a source for identifying certain changes in the Rules. For example, “Notice of Appeal” is defined as the document that “initiates the appeal under Rule 9 and

2. See generally George T. Patton, Jr., *Appellate Rules Proposal Before Rules Committee*, RES GESTAE, April 1999, at 10.

3. INDIANA APPELLATE Rule 1 (effective Jan. 1, 2001).

4. *Id.* at R. 2.

5. *Id.* at R. 2(B).

6. *Id.* at R. 2(C).

7. *Id.* at R. 2(E).

8. *Id.* at R. 2(G).

9. *Id.* at R. 2(H).

replaces the praecipe for appeal.”¹⁰ “Petition” shall be used for rehearing, transfer, or review of a tax court decision, but “[a] request for any other relief shall be denominated a ‘motion.’”¹¹

3. *Rule 3: Use of Forms.*—The new Rules encourage counsel, parties, court reporters, and trial court clerks to use the forms published in an Appendix to the Rules.¹² The forms were included to ease the transition to the new Rules for pro se litigants, trial court clerks, court reporters, and young lawyers, especially in relation to documents that are necessary in most, if not all, appeals.¹³ Some examples include notice of appeal, notice of completion of clerk’s portion of record, transcript covers, notice of completion of transcript, appellant’s case summary, brief covers, appendix covers, and affidavit to proceed *in forma pauperis*.¹⁴

II. TITLE II: JURISDICTION

In order to get the appeal in the correct Indiana appellate court it is first necessary to determine which of the appellate courts has jurisdiction over the appeal. For this reason, the jurisdictional rules were moved forward in the organizational structure of the Rules. Substantively, the jurisdictional rules have not been revised.

1. *Rule 4: Supreme Court Jurisdiction.*—The Indiana Supreme Court’s jurisdiction is broken down into “Appellate Jurisdiction”¹⁵ and “Other Jurisdiction.”¹⁶ As under the prior rules and the current version of the Indiana Constitution prior to the proposed amendment to be voted on November 7, 2000, the Indiana Supreme Court has mandatory and exclusive appellate jurisdiction over “Criminal Appeals” (defined earlier in the new Rules at Appellate Rule 2(G)) in which a sentence of death, life imprisonment, or a minimum term of greater than fifty years for a single offense is imposed.¹⁷ A new additional sentence provides that the Indiana Supreme Court’s jurisdiction in cases denying post-conviction relief is limited to cases in which the sentence was death.¹⁸ This codifies the long-standing practice in the Indiana Supreme Court that experienced criminal appellate practitioners knew but which needed to be made part of the Rules for the benefit of the occasional criminal appellate practitioner.

The rest of Indiana Supreme Court’s mandatory appellate jurisdiction

10. *Id.* at R. 2(I).

11. *Id.* at R. 2(J).

12. *See id.* at R. 3.

13. *See, e.g.,* Patton, *supra* note 2, at 12 (“If any extension of time is needed to prepare the transcript, the court reporter files a forum motion in the appellate court.”).

14. *See id.* at app.

15. *Id.* at R. 4(A).

16. *Id.* at R. 4(B).

17. *Id.* at R. (A)(1)(a). This rule may be amended if the state constitutional amendment scheduled to be voted on November 7, 2000 is passed. *See infra* Part II.

18. *See* IND. APP. R. (A)(1)(a).

remains the same with some minor clarifications consistent with custom and practice. For example, appeals of "Final Judgments" (defined earlier in the new Rules at Appellate Rule 2(H)) "declaring a state or federal statute unconstitutional in whole or in part" go directly to the Indiana Supreme Court.¹⁹ The prior version of this portion of the rule did not refer to Final Judgments, thus the new Rules clarify that a preliminary injunction tentatively enjoining a state or federal statute on the likelihood of unconstitutionality will not go directly to the Indiana Supreme Court as a mandatory matter (although it still might end up before the Indiana Supreme Court through discretionary avenues). A preliminary injunction is not a final ruling in any event, and the trial court might not declare the statute unconstitutional in its final judgment.

The other mandatory cases for the Indiana Supreme Court have been relocated to this jurisdictional section from other parts of the Rules with cross-references from the Indiana Trial Rules. The Indiana Supreme Court still has mandatory appellate jurisdiction over appeals involving the waiver of parental consent to abortion.²⁰ The court also still has mandatory jurisdiction of appeals involving the mandate of funds.²¹

The Indiana Supreme Court continues to have discretionary jurisdiction over cases from the Indiana Court of Appeals when it grants transfer and from the Indiana Tax Court when it grants review.²² While this is not a change, the placement of a subsection on the Indiana Supreme Court's discretionary jurisdiction in the front of the Rules provides clarity to practitioners.

The Indiana Supreme Court's "Other Jurisdiction" consists of its supervisory role over the bench and bar, which remains the same but reorganized.²³ The court has exclusive jurisdiction over the practice of law including "(a) [a]dmission to practice law; (b) [t]he discipline and disbarment of attorneys admitted to the practice of law"; and matters relating to the "unauthorized practice of law."²⁴ Additionally, the court has exclusive jurisdiction to supervise judges, including the "discipline, removal and retirement of justices and judges" in the state,²⁵ and it has exclusive jurisdiction to supervise the lower courts by issuing writs of mandate, prohibition, and any other writ "in aid of its jurisdiction."²⁶

2. *Rule 5: Court of Appeals Jurisdiction.*—The jurisdiction of the Indiana Court of Appeals is set forth in a separate rule, although the substance is the same as before.²⁷ Except if the appeal is within the jurisdiction of the Indiana Supreme Court, the Indiana Court of Appeals has jurisdiction of all appeals of

19. *Id.* at R. 4(A)(1)(b).

20. *See id.* at R. 4(A)(1)(c).

21. *See id.* at R. 4(A)(1)(d).

22. *See id.* at R. 4(A)(2).

23. *Id.* at R. 4(B).

24. *Id.* at R. 4(B)(1).

25. *Id.* at R. 4(B)(2).

26. *Id.* at R. 4(B)(3), (4).

27. *See id.* at R. 5.

“Final Judgments” (defined earlier in Rule 2(H)) notwithstanding any law or statute providing for appeal directly to the Indiana Supreme Court.²⁸ The Indiana Court of Appeals has jurisdiction over interlocutory orders as before, on the same grounds.²⁹

The Indiana Court of Appeals also has jurisdiction over appeals from agency decisions, including “jurisdiction to entertain actions in aid of its jurisdiction and to review final orders, rulings, decisions, and certified questions of an Administrative Agency” (as defined earlier in Rule 2(a)).³⁰ No assignment of error shall be filed in the court of appeals “notwithstanding any law, statute or rule to the contrary” because “[a]ll issues and grounds for appeal appropriately preserved before [the] Administrative Agency may be” raised first in the appellate brief.³¹

3. *Rule 6: Appeal or Original Action in Wrong Court; Rule 7: Review of Sentences; Rule 8: Acquisition of Jurisdiction.*—The new “Jurisdiction” section contains rules on “Appeal or Original Action in Wrong Court”³² and “Review of Sentences”³³ that have been relocated for a better organizational flow. A separate rule entitled “Acquisition of Jurisdiction” states that “[t]he Court on Appeal acquires jurisdiction on the date the trial court clerk issues its Notice of Completion of Clerk’s Record.”³⁴ The “Notice of Completion of Clerk’s Record” is a new concept in the Rules that is part of the initiation of the appeal.³⁵

C. Title III: Initiation of Appeal

1. *Rule 9: Initiation of the Appeal.*—As in the prior rules, appeals from Final Judgments must be initiated within thirty days, unless a party files a timely motion to correct.³⁶ As foreshadowed in the Definitions, the document initiating the appeal is no longer the “Praecipe for Record of Proceedings,”³⁷ which has been expressly abolished,³⁸ but rather a “Notice of Appeal.”³⁹ Use of the descriptive phrase “Notice of Appeal” rather than “Praecipe for Record of Proceeding” was implemented to remove archaic language with which an occasional appellate practitioner might not be familiar.⁴⁰ Like the old praecipe,

28. *Id.* at R. 5(A).
29. *See id.* at R. 5(B).
30. *Id.* at R. 5(C)(1).
31. *Id.* at R. 5(B)(2).
32. *Id.* at R. 6.
33. *Id.* at R. 7.
34. *Id.* at R. 8.
35. *Id.*
36. *See id.* at R. 9(A)(1).
37. IND. APP. R. 2(A) (West Sup. 1999).
38. *See* IND. APP. R. 9(A)(4) (effective Jan. 1, 2001).
39. *Id.* at R. 9(A)(1).
40. Patton, *supra* note 2, at 10 (“removing archaic language when possible”).

the notice "shall be served on all parties of record in the trial court."⁴¹ Also, the notice shall be "served upon the Attorney General in all Criminal Appeals and in any appeals from a final judgment declaring a state statute unconstitutional in whole or in part."⁴² A form for "Notice of Appeal" is provided,⁴³ and a separate provision provides for initiation of interlocutory appeals.⁴⁴

Administrative appeals will now be initiated "by filing a Notice of Appeal with the Administrative Agency within thirty (30) days after the date of the order, ruling or decision, notwithstanding any statute to the contrary."⁴⁵ This is an important change for those practitioners who take administrative appeals as the myriad of statutory appellate schemes that vary from agency to agency that have now been unified in the Rules for the benefit of the occasional appellate practitioner. With all appeals—from final judgments, interlocutory orders, and administrative decisions—unless the Notice of Appeal is timely filed, the right to appeal is forfeited except as provided in Indiana Post-Conviction Rule 2.⁴⁶

As in the current rules, when a trial court imposes a death sentence, it shall "order the court reporter and trial court clerk to begin immediate preparation of the Record on Appeal on the same day."⁴⁷ The Rules, like the prior version, have a provision for joint appeals.⁴⁸ A new rule on the initiation of cross-appeals provides, "[a]n appellee may cross-appeal without filing a Notice of Appeal by raising cross-appeal issues in the appellee's brief. A party must file a Notice of Appeal to preserve its right to appeal if no other party appeals."⁴⁹ The timing of the payment of the appellate filing fee has been changed from being paid simultaneously with the filing of the Record of Proceedings to being due to the Clerk of the Indiana Supreme Court, Indiana Court of Appeals and Indiana Tax Court (defined as the "Clerk" in the Rules, as distinct from the trial court clerk) when the Notice of Appeal is filed in the trial court.⁵⁰ "The filing fee shall be accompanied by a copy of the Notice of Appeal" and "[t]he Clerk shall not file any motion or other document in the proceeding until the filing fee has been paid."⁵¹

The contents of the Notice of Appeal shall: (1) designate the appealed judgment or order and whether it is a final judgment or interlocutory order; (2) denominate the appellate court to which the appeal is taken; (3) direct the trial court clerk to assemble the pleadings and other papers, defined as the Clerk's Record; and (4) request all portions of the transcript necessary to present fairly

41. IND. APP. R. 9(A)(1)(a).

42. *Id.*

43. IND. APP. R. Form 9-1 (effective Jan. 1, 2001).

44. *See id.* at R. 9(A)(2), 14.

45. *Id.* at R. 9(A)(3).

46. *See id.* at R. 9(A)(5).

47. *Id.* at R. 9(B).

48. *See id.* at R. 9(C).

49. *Id.* at R. 9(D).

50. *See id.* at R. 9(E).

51. *Id.*

and decide the issues on appeal.⁵² The new rule adds for the first time, that “[i]f the appellant intends to urge on appeal that a finding of fact or conclusion thereon is unsupported by the evidence or is contrary to the evidence, the Notice of Appeal shall request a Transcript of all the evidence.”⁵³ Also added is the provision that in criminal appeals, “the Notice of Appeal must request the Transcript of the entire trial or evidentiary hearing, unless the party intends to limit the appeal to an issue requiring no Transcript.”⁵⁴ Any party to the appeal may file with the trial court clerk or Administrative Agency, without leave of court, a request for additional portions of the Transcript.⁵⁵ When the “Transcript is requested, a party must make satisfactory arrangements with the court reporter for payment of the cost of the Transcript,” and “[u]nless a court order requires otherwise, each party shall be responsible to pay all transcription costs associated with the Transcript that party requests.”⁵⁶ As for Administrative Agency appeals, the Notice of Appeal is to include the same contents and is to be handled in the same manner as an appeal from a final judgment in a civil case, notwithstanding any statute to the contrary.⁵⁷ Additionally, assignments of error are not required.⁵⁸

2. *Rule 10: Duties of Trial Court Clerk or Administrative Agency.*—Unlike the prior version, in the new Rules the duties of the trial court clerk or Administrative Agency, with respect to the initiation of an appeal, are set forth in a single rule.⁵⁹ If a Transcript is requested, the trial court clerk or Administrative Agency is to notify the court reporter immediately.⁶⁰ Within thirty days of the filing of the Notice of Appeal, the trial court clerk or Administrative Agency must assemble the Clerk’s Record without any obligation to index or marginally annotate the papers.⁶¹ The Clerk’s Record is earlier defined as “the Record maintained by the clerk of the trial court or the Administrative Agency and shall consist of the Chronological Case Summary (CCS) and all papers, pleadings, documents, orders, judgments, and other materials filed in the trial court or Administrative Agency or listed in the CCS.”⁶²

When the Clerk’s Record is assembled (note that the rule does not say copied, thereby saving the time and expense of copying unnecessary documents), the trial court clerk or Administrative Agency is to file a “Notice of Completion of Clerk’s Record” with the “Clerk,” defined as the Clerk of the Indiana Supreme

52. See *id.* at R. 9(F).

53. *Id.* at R. 9(F)(4).

54. *Id.*

55. See *id.* at R. 9(G).

56. *Id.* at R. 9(H).

57. See *id.* at R. 9(I).

58. See *id.*

59. See *id.* at R. 10.

60. See *id.* at R. 10(C).

61. See *id.* at R. 10(B).

62. *Id.* at R. 2(E).

Court, Indiana Court of Appeals, and Indiana Tax Court,⁶³ as well as send notice to all parties in the trial court.⁶⁴ The notice of completion shall include a certified copy of the Chronological Case Summary and shall state whether the Transcript is (a) completed, (b) not completed, or (c) not requested.”⁶⁵ A form Notice of Completion of Clerk’s Record is provided.⁶⁶

If the Transcript has not been filed when the trial court clerk or Administrative Agency issues the Notice of Completion of Clerk’s Record, the trial court clerk or Administrative Agency shall file a Notice of Completion of Transcript with the Clerk and serve a copy on the parties.⁶⁷ A form, Notice of Completion of Transcript, is included.⁶⁸ The trial court clerk can move the appellate court designated in the Notice of Appeal for an extension of time to assemble the Clerk’s Record, with a proposed form provided.⁶⁹ “Motions for extensions of time in interlocutory appeals, appeals involving worker’s compensation, issues of child custody, support, visitation, paternity, determination that a child is in need of services, and termination of parental rights are disfavored and shall be granted only in extraordinary circumstances.”⁷⁰ If the trial court clerk or Administrative Agency fails to timely issue a Notice of Completion of Clerk’s Record, the appellant must seek an order from the appellate court compelling the trial court clerk to complete the Clerk’s Record and issue its Notice of Completion.⁷¹ If the appellant does not seek such an order within fifteen days after the Notice of Completion of Clerk’s Record was due to have been issued, the appeal shall be subject to dismissal.⁷² Under the prior rules, the filing of the Record of Proceedings was a jurisdictional deadline,⁷³ which has been removed in the new Rules, but the appellant still must monitor the appeal to ensure that the trial court clerk or Administrative Agency has issued the Notice of Completion of Clerk’s Record in a timely fashion, and no later than fifteen days after the appointed time seek the aforementioned order from the appellate court.⁷⁴

3. *Rule 11: Duties of Court Reporter.*—Just as the duties of the trial court clerk and Administrative Agency with respect to the initiation of an appeal have been set forth in a separate rule, so have the duties of the court reporter.⁷⁵ The court reporter shall prepare, certify, and file the Transcript designated in the

63. *Id.* at R. 2(D).

64. *See id.* at R. 10(C).

65. *Id.*

66. *See* IND. APP. R. Form 10-1 (effective Jan. 1, 2001).

67. *See* IND. APP. R. 10(D).

68. *See* IND. APP. R. Form 10-2.

69. *See* IND. APP. R. 10(E); IND. APP. R. Form 10-3.

70. IND. APP. R. 10(E).

71. *See id.* at R. 10(F).

72. *See id.*

73. *See* IND. APP. R. 8.1(A) (West 1996).

74. *See* IND. APP. R. 10(F) (effective Jan. 1, 2001).

75. *See id.* at R. 11.

Notice of Appeal with the trial court clerk or Administrative Agency.⁷⁶ The court reporter shall provide notice to all parties to the appeal that the Transcript has been filed with the trial court clerk or Administrative Agency, and a sample form is provided.⁷⁷ The court reporter has ninety days after the appellant files the Notice of Appeal to file the Transcript with the trial court clerk or Administrative Agency.⁷⁸ The court reporter may move the appellate court designated in the Notice of Appeal for an extension of time to file the Transcript stating the factual basis for the inability to comply with the prescribed deadline despite the exercise of due diligence.⁷⁹ A sample form is offered.⁸⁰ Requests for extensions in certain cases involving children and other appeals are disfavored and will be granted only in extraordinary circumstances, similar motions for extensions filed by the trial court clerk.⁸¹ If the court reporter fails to file the Transcript with the trial court clerk or Administrative Agency within the time allowed, the appellant must seek an order from the appellate court compelling the court reporter to do so.⁸² "Failure of appellant to seek such an order not later than fifteen (15) days after the transcript was due to have been filed with the trial court clerk shall subject the appeal to dismissal."⁸³ Under the new Rules, the appellant is obligated to monitor the court reporter or the appeal will be subject to dismissal.⁸⁴

4. *Rule 12: Transmittal of the Record.*—The transmittal of the Record has been revised to assist practitioners outside of Indianapolis, where the Record of Proceedings are currently stored. "Unless the [appellate court] orders otherwise, the trial court clerk shall retain the Clerk's Record throughout the appeal."⁸⁵ A party may request a copy of all or portions of the Clerk's Record from the trial court clerk, which shall be provided within thirty days.⁸⁶ The trial court clerk or Administrative Agency shall retain the Transcript until the Clerk gives notice that all briefing is complete, at which time the Transcript is transmitted to the Clerk.⁸⁷ Any party may withdraw the Transcript or a copy, at no extra cost, from the trial court clerk or Administrative Agency up to the time the party's brief is to be filed.⁸⁸ "[A]ny party may copy any document from the Clerk's Record and any portion or all of the Transcript."⁸⁹

76. See *id.* at R. 11(A); see also *id.* at R. 28-29 (regarding form of transcript).

77. See *id.* at R. 11(A); IND. APP. R. Form 11-1.

78. See IND. APP. R. 11(B).

79. See *id.* at R. 11(C).

80. See IND. APP. R. Form 11-2.

81. See IND. APP. R. 11(C).

82. See *id.* at R. 11(D).

83. *Id.*

84. See *id.*

85. *Id.* at R. 12(A).

86. See *id.*

87. See *id.* at R. 12(B).

88. See *id.*

89. *Id.* at R. 12(C).

5. *Rule 13: Preparation of the Record in Administrative Agency Cases.*—The preparation of the record in Administrative Agency cases is to follow, to the extent possible, the same procedure as civil cases.⁹⁰ The preparation, contents, and transmittal are governed by the same provisions applicable to appeals from Final Judgments in civil cases, including all applicable time periods, notwithstanding any statute to the contrary.⁹¹ While the inexperienced appellate practitioner might still follow a statute setting forth an appeal procedure from an Administrative Agency, the hope is that any such existing statutes will be repealed by the Indiana General Assembly in the near future as they no longer have any effect.

6. *Rule 14: Interlocutory Appeals.*—The initiation of interlocutory appeals is an area where additional deadlines and more specific procedures have been set forth.⁹² Interlocutory appeals of right shall be taken by filing a Notice of Appeal with the trial court clerk within thirty days of the entry of the following interlocutory orders (which are the same as in the prior rules, although some have been broken out or added to the list from other places to assist the occasional appellate practitioner).⁹³ The list includes appeals from the following interlocutory orders: (1) for the payment of money; (2) to compel the execution of any document; (3) to compel the delivery or assignment of any securities, evidence of debt, documents, or things in action; (4) for the sale or delivery of the possession of real property; (5) granting or refusing to grant, dissolving, or refusing to dissolve a preliminary injunction; (6) appointing or refusing to appoint a receiver, or revoking or refusing to revoke the appointment of a receiver; (7) for a writ of habeas corpus not otherwise authorized to be taken directly to the supreme court; (8) transferring or refusing to transfer a case under Trial Rule 75; and (9) issued by an Administrative Agency that by statute is expressly required to be appealed as mandatory interlocutory appeal.⁹⁴ If the appeal is not filed within thirty days, the issue is waived.⁹⁵

The new procedures for discretionary interlocutory appeals contain new specifications and time deadlines. As before, an interlocutory appeal may be taken from any other interlocutory order if the trial court certifies it and the appellate court accepts jurisdiction over the appeal.⁹⁶ “The trial court, in its discretion, upon motion by a party, may certify an interlocutory order to allow an immediate appeal.”⁹⁷ The Rules contain a thirty-day deadline for seeking certification in the trial court unless the trial court permits a belated motion for good cause.⁹⁸ The Rules also specify for the first time what the motion should

90. See *id.* at R. 13.

91. See *id.*

92. See *id.* at R. 14.

93. See *id.* at R. 14(A).

94. See *id.* at R. 14(A)(1)-(9).

95. See *id.*

96. See *id.* at R. 14(B).

97. *Id.* at R. 14(B)(1).

98. See *id.* at R. 14(B)(1)(a).

contain: “(i) [a]n identification of the interlocutory order sought to be certified; (ii) [a] concise statement of the issues to be addressed in the interlocutory appeal; and (iii) [t]he reasons why an interlocutory appeal should be permitted.”⁹⁹ The grounds for the trial court to grant a discretionary interlocutory appeal remain the same: (i) the appellant will suffer substantial expense, damage or injury if the order is erroneous and the determination of the error is withheld until after judgment; (ii) the order involves a substantial question of law, the early determination of which will promote a more orderly disposition of the case (the best ground for success); and (iii) the remedy by appeal is otherwise inadequate.¹⁰⁰ The Rules provide for the first time for a response to a motion for a trial court to certify an interlocutory order, which must be filed within fifteen days from service of the motion.¹⁰¹ The new Rules also contain an automatic “deemed denied” provision if the trial court fails to set the motion for hearing within forty-five days or fails to rule on the motion within thirty days after the hearing.¹⁰²

If the trial court certifies an order for interlocutory appeal, the court of appeals, upon motion by a party, *may* accept jurisdiction of the appeal.¹⁰³ The motion requesting the court of appeals accept jurisdiction over an interlocutory order must be filed within thirty days of the date of the trial court’s certification.¹⁰⁴ The motion requesting the court of appeals to accept jurisdiction over an interlocutory order shall state: (i) the date of the interlocutory order; (ii) the date the motion to certify was filed in the trial court; (iii) the date the trial court certified its interlocutory order; and (iv) the reason the court of appeals should accept the interlocutory appeal.¹⁰⁵ A new provision requires that a copy of the trial court’s certification and a copy of the interlocutory order on appeal be attached to the motion.¹⁰⁶ Any response to the motion requesting the court of appeals to accept jurisdiction shall be filed within fifteen days after service of the motion.¹⁰⁷ If the court of appeals accepts jurisdiction, the appellant shall file a Notice of Appeals with the trial court clerk within fifteen days of the court of appeals’ order and pay the appellate filing fee at that time.¹⁰⁸ All other interlocutory appeals may be taken only as provided by statute.¹⁰⁹

The trial court clerk shall assemble the Clerk’s Record in the same fashion as an appeal from a final judgment, and the court shall do the same with respect

99. *Id.* at R. 14(B)(1)(b).

100. *See id.* at R. 14(B)(1)(c).

101. *See id.* at R. 14(B)(1)(d).

102. *Id.* at R. 14(B)(1)(e).

103. *See id.* at R. 14(B)(2).

104. *See id.* at R. 14(B)(2)(a).

105. *See id.* at R. 14(B)(2)(b).

106. *See id.* at R. 14(B)(2)(c).

107. *See id.* at R. 14(B)(2)(d).

108. *See id.* at R. 14(B)(3).

109. *See id.* at R. 14(C).

to the Transcript.¹¹⁰ The prior rules set a shorter deadline for filing the record in interlocutory appeals (thirty days versus ninety days) that no longer applies.¹¹¹ Briefing in interlocutory appeals will also have the same deadlines as briefing in an appeal from a final judgment.¹¹² However, the prior rules set a shorter briefing schedule for interlocutory appeals that no longer applies.¹¹³ A party can seek to either shorten or extend the time deadlines.¹¹⁴ Upon motion, and for good cause, the court of appeals may shorten any time period in an interlocutory appeal.¹¹⁵ A motion to shorten time shall be filed within ten days of the filing of either the Notice of Appeal with the trial court clerk or the motion to the court of appeals requesting permission to file an interlocutory appeal.¹¹⁶ Extensions of time to prepare the Transcript (and presumably the Clerk's Record) or to file any brief in an interlocutory appeal are disfavored and will be granted only upon a showing of good cause.¹¹⁷

As before, "[a]n interlocutory appeal shall not stay proceedings in the trial court unless the trial court or a judge of the Court of Appeals so orders."¹¹⁸ Additionally, "[t]he order staying proceedings may be conditioned upon the furnishing of a bond or security protecting the appellee against loss incurred by the interlocutory appeal."¹¹⁹

7. *Rule 15: Appellant's Case Summary.*—The "Appellant's Case Summary" replaces what used to be known as the "Court of Appeals Notice of Appeal." The Committee felt that the title of the document described the function of the document and wanted to avoid confusion with the new Notice of Appeal that initiates an appeal. "Any party who has filed a Notice of Appeal shall file an Appellant's Case Summary with the Clerk,"¹²⁰ for which the Rules provide a form.¹²¹ The filing of the Appellant's Case Summary satisfies the requirement for filing an appearance.¹²² The Appellant's Case Summary must be filed within thirty days of the filing of the Notice of Appeal or, in the case of an interlocutory appeal, at the same time as the filing of either the Notice of Appeal with the trial court clerk or the motion to the court of appeals requesting permission to file an interlocutory appeal.¹²³

The trial information is required to contain an Appellant's Case Summary,

110. See *id.* at R. 14(D).

111. See IND. APP. R. 3(B) (West 1996).

112. See IND. APP. R. 14(E) (effective Jan. 1, 2001).

113. See IND. APP. R. 8.1(B) (West 1996).

114. See IND. APP. R. 14(F) (effective Jan. 1, 2001).

115. See *id.* at R. 14(F)(2).

116. See *id.*

117. See *id.* at R. 14(F)(1).

118. *Id.* at R. 14(G).

119. *Id.*

120. *Id.* at R. 15(A).

121. See IND. APP. R. Form 15-1 (effective Jan. 1, 2001).

122. See at IND. APP. R. 15(A) (effective Jan. 1, 2001).

123. See *id.* at R. 15(B).

the same as the current court of appeals Notice of Appeal, with one addition.¹²⁴ The trial information must contain the names of all parties.¹²⁵ The attachments are also the same with one new requirement that makes explicit what previously was implicit: in Administrative Agency cases, a copy of the order, ruling, or decision appealed from, including any order or ruling on any motion or request for rehearing must be attached.¹²⁶ As before, “[t]he Clerk shall not accept for filing any paper, motion, or other filing by an appellant until that appellant has filed its Appellant’s Case Summary,” however, “[t]he failure to file an Appellant’s Case Summary shall not forfeit the appeal.”¹²⁷

8. *Rule 16: Appearances.*—The new Rule on Appearances is similar to old rule except in three respects. First, the new Rules expressly state as to initiating parties, “[t]he filing of an Appellant’s Case Summary . . . satisfies the requirement to file an appearance.”¹²⁸ The current rule on appearances for the initiating parties required information that was also required by the court of appeals Notice of Appeal.¹²⁹ Thus, the rule is redundant. In order to streamline the Rules and to avoid duplication, the new Rule on Appearances for the initiating party was shortened to the aforementioned single sentence. Second, the new rules clarify that duplicate appearance forms need not be filed if a party is seeking transfer to the Indiana Supreme Court from the court of appeals or review by the Indiana Supreme Court from a decision of a the tax court.¹³⁰ While this is the current practice, some occasional or infrequent appellate practitioners might not have been aware of the practice, and therefore have been filing unnecessary duplicate appearances. Third, a new Rule addresses the withdrawal of appearances.¹³¹ While withdrawal of appearances occur under the current rules, no rule expressly set forth the procedures or the court’s desire to have the new attorney’s appearance with the motion to withdraw.

9. *Rule 17: Parties on Appeal.*—The new Rule relating to parties on appeal contains a couple of developments. The death or incompetence of any or all of the parties on appeal shall not cause the appeal to abate, but the death of a criminal defendant abates a Criminal Appeal.¹³² Successor parties may be substituted for deceased or incompetent parties in civil proceedings.¹³³ A new subsection on “Substitution of Parties” provides, “[w]hen a public officer who is sued in an official capacity dies, resigns or otherwise no longer holds public office, the officer’s successor is automatically substituted as a party” by notice

124. See *id.* at R. 15(C).

125. See *id.* at R. 15(C)(2)(b).

126. See *id.* at R. 15(D)(5).

127. *Id.* at R. 15(E).

128. *Id.* at R. 16(A).

129. See IND. APP. R. 2.1(A) (West 1996).

130. See IND. APP. R. 16(F) (effective Jan. 1, 2001).

131. See *id.* at R. 16(G).

132. See *id.* at R. 17(B).

133. See *id.*

filed with the Clerk.¹³⁴ The substitution of other parties is also achieved by notice to the Clerk advising the court of the substitution, but the failure of any party to file a notice shall not affect the party's substantive rights.¹³⁵

10. *Rule 18: Appeal Bonds-Letters of Credit.*—There was only one significant development relating to appeal bonds. Under the new Rules, an irrevocable letter of credit may be used instead of a bond.¹³⁶ Thus, parties have greater flexibility because the expense of a letter of credit may be less than that of posting a bond.

11. *Rule 19: Court of Appeals Preappeal Conference.*—The new Rule on preappeal conferences is much shorter than the prior version, recognizing the limited number of cases that now go through the process.¹³⁷ Some of the internal operating aspects of the prior rule on preappeal conferences have been removed because they are for the court of appeals to decide and do not need to be a part of the rule's language. The court of appeals may still impose sanctions if an attorney is unprepared to participate in the conference.¹³⁸

12. *Rule 20: Appellate Alternative Dispute Resolution.*—While the practice in the court of appeals was to conduct some appellate alternative dispute resolution, no rules specifically provided for it. The new Rule states, "[t]he Court on Appeal may, upon motion of any party or its own motion, conduct or order appellate alternative dispute resolution."¹³⁹ This is another example of a rule being added to conform to practice.

D. Title IV: General Provisions

1. *Rule 21: Order in Which Appeals Are Considered.*—The Rules specify that Indiana appellate courts "give expedited consideration to interlocutory appeals and appeals involving issues of child custody, support, visitation, adoption, paternity, determination that a child is in need of services, termination of parental rights, and all other appeals entitled to priority by rule or statute."¹⁴⁰ Any party may move for expedited consideration in any other appeal that involves the constitutionality of any law, the public revenue, public health, or any other case of general public concern with good cause.¹⁴¹

2. *Rule 22: Citation Form.*—The new rule on citation form contains some additions to the current rules and specific new requirements. First, the default provision, if no other provision provides differently, is that the most current edition of the Uniform System of Citation (Bluebook) shall be followed.¹⁴²

134. *Id.* at R. 17(C)(1).

135. *See id.* at R. 17(C)(2).

136. *See id.* at R. 18.

137. *See id.* at R. 19(A).

138. *See id.* at R. 19(B).

139. *Id.* at R. 20.

140. *Id.* at R. 21(A).

141. *See id.* at R. 21(B).

142. *See id.* at R. 22.

Second, as to all cases, the citation shall give the title of the case followed by the volume and page of the regional and official reporter, the court of disposition, and the year of the opinion.¹⁴³ For example, *Callender v. State*, 138 N.E. 817 (Ind. 1922), and *Moran v. State*, 644 N.E.2d 536 (Ind. 1994). However, “[i]f the case is not contained in the regional reporter, citation may be made to the official reporter.”¹⁴⁴ Although prior case decisions have required pinpoint citation for both reporters when applicable, the new rule states, “[p]inpoint citations to one of the reporters shall be provided.”¹⁴⁵ The rule provides “[d]esignations of petitions for transfer shall be included” giving examples.¹⁴⁶

The form of citation to Indiana statutes, regulations, and court rules is largely the same with some additions:

<u>Initial</u>	<u>Subsequent</u>
IND. CODE § 34-1-1-1	I.C. § 34-1-1-1
Ind.Admin. Code 12-5-1	IAC 12-5-1 ¹⁴⁷

With regard to reference to the Record on Appeal, every factual statement must be supported by a citation first to the appendix, if contained there, and if not contained in the appendix, then to the page in the Transcript, such as: “Appellant’s App. p. 5; Answer, p. 10; Tr. P. 231-32.”¹⁴⁸ “Any record material cited in an appellate brief must be reproduced in an Appendix unless it is already before the Court on Appeal.”¹⁴⁹ As before, reference to parties by such designation as appellant or appellee must be avoided; rather, parties should instead be referred to by their names or by descriptive titles.¹⁵⁰ The Rules provide a new list of abbreviations that may be used in citations and reference without explanation, specifically: App. (appendix); Br. (brief), CCS (chronological case summary), Ct. (court), Def. (defendant), Hr. (hearing), Mem. (memorandum), Pet. (petition), Pl. (plaintiff), Supp. (supplemental), and Tr. (transcript).¹⁵¹

3. *Rule 23 Filing.*—The new Rule on filing contains instances of codifying existing practices and policy. Filing includes personal delivery to the Clerk “including rotunda filing with the guard of the State House.”¹⁵² Filing also includes, in addition to U.S. mail, “deposit[ing] with any third-party commercial carrier [e.g., United Parcel Service, Fed-Ex] for delivery to the Clerk within three

143. See *id.*

144. IND. APP. R. 22(A) (effective Jan. 1, 2001).

145. *Id.*

146. *Id.* (citing *Smith v. State*, 717 N.E.2d 1277 (Ind. Ct. App.), *trans. denied*, 726 N.E.2d 316 (1999) (mem.); *State ex rel. Mass Transp. Auth. of Greater Indianapolis v. Indiana Revenue Bd.*, 242 N.E.2d 642 (1968), *trans. denied by an evenly divided court*, 244 N.E.2d 111 (1969).

147. *Id.* at R. 22(B).

148. See *id.* at R. 22(C).

149. *Id.*

150. See *id.* at R. 22(D).

151. See *id.* at R. 22(E).

152. *Id.* at R. 23(A)(1).

(3) calendar days, cost prepaid, properly addressed.”¹⁵³ If a paper is filed by any method other than personal delivery to the Clerk, the party shall retain proof of such delivery.¹⁵⁴ Given prior disputes between litigants, counsel, and the Clerk regarding filing, the new Rules codify a policy that has been in existence regarding the Clerk’s functions: “[a]ll functions performed by the Clerk are ministerial and not discretionary. The court retains the authority to determine compliance with these Rules.”¹⁵⁵

The number of copies of paper filings has been relocated to this Rule on filing.¹⁵⁶ The new rules also clarify a difficult area that arises when the Clerk has received a document for filing but refuses to file it due to some non-compliance with the rules: “When the Clerk accepts any document as received but not filed, any time limit for response or reply to that document shall run from the date on which the document is [later accepted as] filed. The Clerk shall notify all parties of the date on which any received document is subsequently filed.”¹⁵⁷ This new provision avoids the Alice in Wonderland, topsy-turvy problem of having a reply or response due before the paper is even accepted for filing by the appellate court.

4. *Rule 24: Service of Documents.*—The new Rules clarify that parties to the appeal do not have to serve documents related to the appeal, other than the Appellant’s Case Summary and Appearances, upon all parties in the trial court or Administrative Agency unless that party has filed an appearance with the appellate court.¹⁵⁸ This avoids copying unnecessary papers, particularly when there are numerous parties below who are not interested enough in the appeal to even file an appearance form. The new Rule also provides for service by any third-party commercial carrier for delivery within three calendar days.¹⁵⁹ Finally, as to service, the new Rule states that “[t]he certificate of service shall be placed at the end of the document and shall not be separately filed,” but the failure to do so shall not be grounds for rejecting a document for filing.¹⁶⁰

5. *Rule 25: Computation of Time.*—The new Rules contain some minor differences on the computation of time, specifically the shortening of some periods. “When the time allowed is less than seven (7) days, all non-business days shall be excluded from the computation.”¹⁶¹ The prior rules had ten days in a similar provision.¹⁶² Also, the automatic extension of time when served by mail or carrier has been reduced to three days rather than five days.¹⁶³ The shorter

153. *Id.* at R. 23(A)(3).

154. *See id.* at R. 23(A).

155. *Id.* at R. 23(B).

156. *See id.* at R. 23(C).

157. *Id.* at R. 23(D).

158. *See id.* at R. 24(A).

159. *See id.* at R. 24(C)(3).

160. *Id.* at R. 24(D).

161. *Id.* at R. 25(B).

162. *See* IND. APP. R. 13 (West 1996).

163. *See* IND. APP. R. 25(C) (effective Jan. 1, 2001).

time period in the new Rule is consistent with the time period provided in the trial rules and more closely comports with the time actually necessary for documents to move through the mail.¹⁶⁴

6. *Rule 26: FAX Transmission by Clerk.*—As before, any party may request facsimile transmission by the Clerk of any opinion or order, but when transmission is made in this manner there is no hard-copy sent by regular mail.¹⁶⁵ Any request for transmission must be in writing.¹⁶⁶ “The Clerk may, without notice, discontinue fax transmission if electronic transmission is not practicable.”¹⁶⁷

E. *Title V: Record on Appeal*

The changes in the Record on Appeal are some of the most significant in the new Rules. The goal was to reduce the time, paper, and expense for counsel or pro se litigants to prepare. Less paper should allow the appellate judges to review only those documents necessary to the appeal. Under the current system, many papers were copied at the beginning of the process never to be used as the issues were narrowed during the briefing. Many appeals contained long time deadlines to prepare records in which a motion to dismiss or summary judgment was granted and little, if any, transcription was necessary such that the record could be completed well short of the ninety day time deadline. The goal was to create a faster, simpler, cheaper, and easier record preparation system. Learning the new system will be an important educational challenge for lawyers across Indiana who practice in the state appellate courts as well as for trial court clerks and court reporters who have different duties.

1. *Rule 27: The Record on Appeal.*—Instead of the “Record of Proceedings,” the new Rules provide for the “Record on Appeal” which consists of: (1) the Clerk’s Record; and (2) all proceedings before the trial court or Administrative Agency, whether or not transcribed or transmitted to the appellate court.¹⁶⁸ Any rule regarding the Record on Appeal may be enforced by order of the appellate court in which the appeal is pending.¹⁶⁹

2. *Rule 28: Preparation of Transcript in Paper Format by Court Reporter.*—The key changes here relate to the court reporter more so than the party taking the appeal, appellate counsel, or the trial court judge. While many of the provisions relate to paper size, margins, and typing, there are some provisions regarding number, header notations, binding, title page and cover, and table of contents.¹⁷⁰ “The pages of the Transcript shall be numbered

164. See Ind. Trial Rule 6(E) (effective Jan. 1, 2001).
165. See IND. APP. R. 26(A).
166. See *id.* at R. 26(B).
167. *Id.* at R. 26(C).
168. *Id.* at R. 27.
169. See *id.*
170. See *id.* at R. 28(A).

consecutively regardless of the number of volumes the Transcript requires.”¹⁷¹ This will make for easier citation. The marginal notation that were the bane of lawyers now have been termed “Header Notations” in which “[t]he court reporter shall note in boldface capital letters at the top of each page where a witness’s direct, cross, or redirect examination begins. No other notations are required.”¹⁷² The Transcript shall be bound at the left in such a fashion as to be easy to read while permitting easy disassembly for copying.¹⁷³ Each 250-page volume shall have a title page that conforms with a form and the cover shall be clear plastic.¹⁷⁴ As to the “Table of Contents,” the new provision reads,

[t]he court reporter shall prepare a table of contents listing each witness and the volume and page where that witness’ direct, cross, and redirect examination begins. The table of contents shall identify each exhibit offered and shall show the Transcript volumes and pages at which the exhibit was identified and at which a ruling was made on its admission in evidence. The table of contents shall be a separately bound volume.¹⁷⁵

While these requirements are similar to those in the prior rules, the court reporter is to prepare this document rather than appellate counsel or the pro se litigants.

Another change is that the Transcript is only to be certified by the court reporter rather than both the court reporter and the trial court judge.¹⁷⁶ The sense was that trial court judges rarely have the time to read lengthy transcripts and trust their official court reporter, who would be responsible for any transcription problems in any event. Finally, when a paper Transcript is generated on a word processing system, an electronic format of the Transcript in whatever word processing format is used shall be included with the paper version.¹⁷⁷ While not mandating the use of any particular type of word processing system, this provision recognizes that many court reporters use them to prepare transcripts and thus are easily available to be copied onto to a disk for use by counsel and appellate judges in locating particular testimony in especially voluminous transcripts.

3. *Rule 29: Exhibits.*—In a change from the current rules, exhibits will no longer be incorporated into the Transcript where offered and admitted, but will be contained in separately-bound volumes.¹⁷⁸ In a continuation of a prior rule,

[n]ondocumentary and oversized exhibits shall not be sent to the Court, but shall remain in the custody of the trial court or Administrative Agency during the appeal. Such exhibits shall be briefly identified in the

171. *Id.* at R. 28(A)(2).

172. *Id.* at R. 28(A)(4).

173. *See id.* at R. 28(A)(6).

174. *See id.* at R. 28(A)(7); IND. APP. R. Form 28-1.

175. IND. APP. R. 28(A)(8) (effective Jan. 1, 2001).

176. *See id.* at R. 28(B).

177. *See id.* at R. 28(C).

178. *See id.* at R. 29(A).

Transcript where they were admitted into evidence. Photographs of any exhibit may be included in the volume of documentary exhibits.¹⁷⁹

4. *Rule 30: Preparation of Transcript in Electronic Format Only.*—This rule is unchanged from the prior version.¹⁸⁰ To date, no Transcripts have been submitted in electronic format only due to difficulties selecting a uniform computer, word-processing format. For this reason, when a paper Transcript is being generated on any word-processing system, the new Rules require the court reporter to submit a copy of the Transcript in an electronic format in case the appellate court is compatible with whatever format the court reporter happens to have used.

5. *Rule 31: Statement of Evidence When No Transcript Is Available.*—Although the trial court judge no longer has to file a “Judges Certificate” settling the Transcript when a paper Transcript prepared by the court reporter is available, the trial court judge remains involved under the new Rules when no Transcript is available, largely in the same manner as before.¹⁸¹ That is, the trial court judge must determine what actually occurred after considering the parties’ or the attorneys’ recollection.

6. *Rule 32: Correction or Modification of Clerk’s Record or Transcript.*—The new Rules also contemplate disagreement about whether the Clerk’s Record or Transcript accurately discloses what occurred in the trial court or Administrative Agency. “The trial court retains jurisdiction to correct or modify the Clerk’s Record or Transcript at any time before the reply brief is due to be filed.”¹⁸² This is a slight expansion of the trial court’s jurisdiction, which under the current rules ceased upon filing the old Record of Proceedings.

7. *Rule 33: Record on Agreed Statement.*—As before, the Rules provide for a Record on Agreed Statement. The new Rules do contain a limitation to issues presented by appeal that are capable of resolution without reference to the Clerk’s Record or Transcript.¹⁸³ The agreed statement is transmitted to the Court in the Clerk’s Record and must be included in the appendix to appellant’s brief.¹⁸⁴ Use of the procedure does not automatically extend any appellate deadline, but extensions of time may be sought under Rule 35 as in any other appeal.¹⁸⁵

F. Title VI: Motions

Like the changes to the Record, the changes with respect to motions practice in Indiana appellate courts are substantial, hopefully filling the large void in the current rules. These voids cause numerous telephone calls to the administrative

179. *Id.* at R. 29(B).

180. *See id.* at R. 30.

181. *Id.* at R. 31.

182. *Id.* at R. 32(A).

183. *See id.* at R. 33(A).

184. *See id.* at R. 33(D).

185. *See id.* at R. 33(E).

offices of both the Indiana Supreme Court and courts of appeal informing them that a response to a motion would be filed because the current rules do not provide for any response, deadline, or format. The section of the Rules on motions opens with a general Rule applying to all motions and then has specific Rules for commonly filed motions in an appeal.

1. *Rule 34: Motion Practice.*—This is the general Rule that applies to all motions. Initially, one should note that “[u]nless a statute or these Rules provide another form of application, a request for an order or for other relief shall be made by filing a motion in writing.”¹⁸⁶ Currently, some practitioners file a *petition* for extension of time or a *petition* for oral argument, so under the new Rules these should be entitled a *motion for extension of time* or a *motion for oral argument*.

The current practice in the appellate courts was routinely to rule on motions without a response, and some members of the bar were concerned about the opportunity to be heard. Thus, the new Rules identify those motions subject to decision without a response such as: to extend time; file an oversized document; withdraw appearance; substitute a party; and to withdraw a record.¹⁸⁷ The courts will consider any responses filed before it rules on these motions, and a response filed after a ruling on the motion will automatically be treated as a motion to reconsider.¹⁸⁸ Any such response, however, must be filed within ten days of the court’s ruling.¹⁸⁹ In general, a response to a motion is due within ten days, and the fact that no response is filed does not affect the court’s discretion in ruling on the motion.¹⁹⁰ The movant may not file a reply to the response without leave of the court, and any such reply must be filed with the motion for leave and tendered within five days of service of the response.¹⁹¹

The general content of a motion (excluding those that can be ruled on before receiving a response), response, or reply shall be: (1) statement of grounds; (2) statement of supporting facts; (3) statement of supporting law; (4) other required matters; and (5) request for relief.¹⁹² When facts outside the Record on Appeal are presented in the motion, such facts shall be verified and/or accompanied by affidavits or certified copies of documents filed with the trial court or Administrative Agency.¹⁹³ Motions, responses, and replies shall conform with the requirements for citations and references in briefs, with the length being limited to ten pages or 4200 words for motions and response, and five pages or 2100 for replies.¹⁹⁴ Ordinarily, oral argument will not be heard on any motion.¹⁹⁵

186. *Id.* at R. 34(A).

187. *See id.* at R. 34(B).

188. *See id.*

189. *See id.*

190. *See id.* at R. 34(C).

191. *See id.* at R. 34(D).

192. *See id.* at R. 34(E).

193. *See id.* at R. 34(F).

194. *See id.* at R. 34(G).

195. *See id.* at R. 34(H).

2. *Rule 35: Motion for Extension of Time.*—The most common motion is for an extension of time and it is the first specific motion discussed after the general Rule. Any motion for extension of time under the Rules has to be filed at least seven days, rather than five days as provided in the current rules, before the expiration of time unless the movant was not then aware of the facts on which the motion is based.¹⁹⁶ No motion for an extension of time can be filed after the deadline has passed.¹⁹⁷

The new Rule provides potential reasons why an extension of time, in spite of due diligence, may be necessary, such as: (1) engagement in other litigation, provided such litigation is identified by caption, number and court; (2) complexity of issues on appeal; or (3) hardship to counsel, provided the hardship is specifically set forth.¹⁹⁸ In some appellate proceedings, extensions of time are expressly forbidden, such as: Petition for Rehearing; Petition to Transfer to the Indiana Supreme Court; or Petition for Review of a tax court decision by the Indiana Supreme Court. The new Rules have grouped these together in a single section with the Rule on extensions of time.¹⁹⁹ In other appellate proceedings, there are restrictions on extensions such as in worker’s compensation, child custody, support, visitation, Child in Need of Services (“CHINS”), or termination of parental rights proceedings, in which event extensions are only granted in extraordinary circumstances.²⁰⁰

Although not part of the new Rules, a new policy of the court of appeals, effective to appeals initiated by Praecipes/Notices of Appeals filed after January 1, 2001, relates to extensions of time for filing the record or briefs. In adopting the policy, the court of appeals noted that, while the average age of pending fully briefed cases has been reduced to under two months, the average time for record preparation and briefing continues to exceed the time limits provided for in the appellate rules due to extensions of time. The parties to the appeal are most concerned with the total time from the trial court decision to the final appellate decision. The court of appeals’ goal in adopting the policy was to significantly reduce the time for record preparation and briefing, stating that “[i]deally, there would be no extensions of time.”²⁰¹ The policy generally restricts extensions for preparing the record and briefs. The court of appeals realized that in some circumstances it will be necessary for people to change the way they have done business and allocated their time and resources, but the court felt that such changes are necessary if Indiana is to have an efficient and timely appellate process. “We think everyone recognizes the value of such a process,” the court of appeals concluded in introducing the policy.²⁰² The policy is as follows:

196. See *id.* at R. 35(A).
197. See *id.*
198. See *id.* at R. 35(B)(1)(g).
199. See *id.* at R. 35(C).
200. See *id.* at R. 35(D).
201. Letter from Chief Judge of Indiana Court of Appeals, John J. Sharpnack (Dec. 27, 1999) (on file with author).
202. *Id.*

POLICIES REGARDING EXTENSIONS OF TIME

I. Record preparation:

Because the time-limit for the filing of the record in Indiana is three times the American Bar Association Standard and that applicable in federal courts, extensions of time for filing of the record should not be necessary. In child-related cases, extensions for preparation of the record will be granted only upon a showing of extraordinary circumstances. In all other cases, extensions will be granted only upon a showing of good cause. Upon such a showing, no more than one extension not to exceed thirty days shall be granted.

II. Briefing:

A. Child-related cases. Consistent with our publicly-announced policy and the proposed appellate rules, no extensions of time in child-related proceedings will be granted except upon a verified showing of extraordinary circumstances. No extension shall be granted for more than thirty days, and a time shorter than thirty days shall be the norm. Successive motions for extensions shall be denied.

B. Other cases. Extensions of time for filing of briefs will be granted only upon a showing of good cause. Extensions for more than thirty days and successive motions for extension will be granted only upon a verified showing of extraordinary circumstances.

III. What constitutes extraordinary circumstances:

Extraordinary circumstances will be narrowly-construed. Examples of extraordinary circumstances include natural disasters, death or serious illness of the court reporter, primary attorney or member of the attorney's immediate family. Extraordinary circumstances do not include the press of other work.²⁰³

Extensions for more than thirty days and successive motions seem to be the target of the policy in most cases, with the standard being tighter and shorter for child-related cases. Lawyers and court reporters who generally seek more than thirty days total for an extension either in a single motion or successive motions, will need to change their ways. The court of appeals has indicated that the press of other work will not support an extension beyond thirty days.

3. *Rule 36: Motion to Dismiss.*—This new Rule is broken down into voluntary and involuntary dismissal. "An appeal may be dismissed on motion of the appellant upon the terms agreed upon by all the parties on appeal or fixed by

203. IND. APP. R. 35(D).

the court.”²⁰⁴ An appellee may at any time file a motion to dismiss an appeal for any reason provided by law, including lack of jurisdiction; the old motions to affirm are specifically abolished.²⁰⁵ Although an appellee may file a motion to dismiss *at any time*, the appellee should move to dismiss an appeal as soon as possible, hopefully avoiding the fees for an unnecessary briefing.

4. *Rule 37: Motion to Remand.*—Codifying existing case law, this Rule provides the procedures to seek a remand to a trial court while an appeal is pending. For example, a party may be pursuing an interlocutory appeal regarding an injunction when new, potentially dispositive evidence is discovered. At any time after the appellate court obtains jurisdiction, any party may file a motion requesting that the appeal be dismissed without prejudice or temporarily stayed and the case remanded to the trial court or Administrative Agency for further proceedings.²⁰⁶ “The motion must be verified and must demonstrate that remand will promote judicial economy or is otherwise necessary for the administration of justice.”²⁰⁷ The appellate court may dismiss the appeal without prejudice and remand the case to the trial court, or remand the case while retaining jurisdiction, with or without limitation on the trial court’s authority.²⁰⁸ “Unless the order specifically provides otherwise, the trial court or Administrative Agency shall obtain unlimited authority on remand.”²⁰⁹

5. *Rule 38: Motion to Consolidate Appeals.*—This Rule is largely the same as the current version with one addition: “[i]f any party believes that the appeal should not remain consolidated, that party may file a motion to sever the consolidated appeal within thirty (30) days after the first Notice of Appeal is filed.”²¹⁰

6. *Rule 39: Motion to Stay.*—While the substance of the Rule on stays remains similar, some minor procedural changes were necessary to conform the Rule to current practice and help the occasional appellate practitioner. For example, a motion for stay pending appeal in the appellate court shall contain certified or verified copies of: (1) the judgment or order to be stayed; (2) the trial court’s order denying the motion for stay; and (3) other parts of the Clerk’s Record or Transcript that are relevant.²¹¹ If an emergency stay without notice is requested, the moving party shall submit a proposed order outlining the remedy being requested.²¹² As to the length of the stay, unless otherwise ordered, a stay shall remain in effect until the appeal is disposed of in the appellate court, with any party having the right to move for relief from the stay at any time.²¹³

204. IND. APP. R. 36(A) (effective Jan. 1, 2001).

205. See *id.* at R. 36(B).

206. See *id.* at R. 37(A).

207. *Id.*

208. See *id.* at R. 37(B).

209. *Id.*

210. *Id.* at R. 38(A).

211. See *id.* at R. 39(C).

212. See *id.* at R. 39(D).

213. See *id.* at R. 39(F).

7. *Rule 40: Motion to Proceed In Forma Pauperis.*—The new Rule provides extensive guidance on proceeding *in forma pauperis*, plugging a hole in the current rules, thereby benefitting pro se litigants. A party who has been permitted to proceed in the trial court *in forma pauperis* may proceed on appeal in the same manner without further authorization from the trial or appellate court, such as by not paying the filing fee.²¹⁴ Any other party who desires to proceed on appeal *in forma pauperis* shall file a Motion for Leave in the trial court on a form detailing the party's inability to pay fees, costs, or security.²¹⁵ If the trial court grants the motion, the party may proceed without further motion to the appellate court.²¹⁶ If the trial court denies the motion, the trial court shall state its reasons in a written order.²¹⁷ A trial court may later revoke authorization to proceed *in forma pauperis*.²¹⁸ If the trial court denies a party authorization to proceed *in forma pauperis*, the party may file a motion in the appellate court within thirty days of the trial court's order.²¹⁹ A party proceeding *in forma pauperis* is relieved of the obligation to prepay filing fees or costs in either the trial or appellate court or to give security, and may file legibly handwritten or typewritten briefs and other papers.²²⁰

8. *Rule 41. Motion to Appear as Amicus Curiae.*—The Rule on motions to appear *amicus curiae* is substantially similar to the prior version but has been relocated within the overall organization and structure of the Rules. The new Rule for the first time explicitly permits belated filing of *amicus curiae* papers, which is consistent with practice.²²¹

9. *Rule 42: Motion to Strike.*—A new appellate Rule on motions to strike codifies the appellate court's inherent authority and conforms with a similar trial rule:

Upon motion made by a party within the time to respond to a document, or if there is no response permitted, within thirty (30) days after service of the document upon it, or at any time upon the court's own motion, the court may order stricken from any document any redundant, immaterial, scandalous or other inappropriate matter.²²²

G. Title VII: Briefs

The changes in the new Rules on briefs are not as extensive as the changes for the record or motions. Nonetheless, there are changes that should be noted

214. See *id.* at R. 40(A)(1).

215. See *id.* at R. 40(A)(2); see also IND. APP. R. Form 40-1 (effective Jan. 1, 2001).

216. See IND. APP. R. 40(A)(2) (effective Jan. 1, 2001).

217. See *id.*

218. See *id.* at R. 40(A)(3).

219. See *id.* at R. 40(A)(4).

220. See *id.* at R. 40(D).

221. See *id.* at R. 41(D).

222. *Id.* at R. 42.

by any practitioner or pro se litigant appearing in Indiana's appellate courts.

1. *Rule 43: Form of Briefs and Petitions.*—The new Rules bring more colors to covers of appellate briefs, such as white for a petition for rehearing or response, orange for a petition to transfer or review, yellow for a response to transfer or review, and tan for a reply in support of transfer or review.²²³ As before, the document shall be bound in book or pamphlet form, but in the new Rules a preference is stated for the first time for “[a]ny binding process which permits the document to lie flat when opened” such as spiral-binding.²²⁴ Also, “[a]ll documents *may* be accompanied by a copy of the document in electronic format. Any electronic format used by the word processing system to generate the document is permissible.”²²⁵ The Rule will encourage lawyers to submit disks to assist the appellate courts in resolving the appeal without mandating a particular form of word processing system.

2. *Rule 44: Brief and Petition Length Limitations.*—The new developments on length limitations provide certain deadlines that did not exist previously or were in need of clarification. A motion requesting leave to file an oversized brief or Petition shall be filed at least fifteen days before the deadline.²²⁶ Certain items will be expressly excluded from the length limitation, such as: cover information; table of contents; table of authorities; signature block; certificate of service; word count certificate; appealed judgment or order; and question presented on transfer.²²⁷ The only change and addition to the page and word count is a shortening of reply briefs to fifteen pages or 7000 words, and a clarification related to cross-appeals—specifically a reply brief with cross-appellee's brief can be no more than thirty pages or 14,000 words.²²⁸ An acceptable form of word count certification is included in the Rules.²²⁹

3. *Rule 45: Time for Filing Briefs.*—The time for filing briefs has been changed. The appellant's brief shall be filed no later than thirty days after: (a) the date the trial court clerk or Administrative Agency issues its notice of the Clerk's Record if the notice reports that the Transcript is complete or that no Transcript has been requested (resulting in a substantially expedited appeal that fits within this category); or (b) in all other cases, the date the trial court clerk or Administrative Agency issues its notice of completion of Transcript (the same time frame as in the current rules).²³⁰ The appellee's brief shall be filed no later than thirty days after the appellant's brief has been served.²³¹ Any appellant's reply brief shall be filed no later than fifteen days after the appellee's brief has

223. See *id.* at R. 43(H).

224. *Id.* at R. 43(J).

225. *Id.* at R. 43(K) (emphasis added).

226. See *id.* at R. 44(B).

227. See *id.* at R. 44(C).

228. See *id.* at R. 44(D), (E).

229. See *id.* at R. 44(F).

230. See *id.* at R. 45(B)(1).

231. See *id.* at R. 45(B)(2).

been served.²³² This thirty day-thirty day-fifteen day time frame was consistent with appeals from final judgments under the old rules, but is longer than the ten day-ten day-five day time frame briefing for interlocutory appeals under the current Rules, which would occasionally trip up the novice appellate litigator. Of course, under the new Rules, a party can move to shorten time in an interlocutory appeal if that is necessary.

Furthermore, the briefing in cross-appeals has been clarified. If the appellant's reply brief also serves as the cross-appellee's brief, it shall be filed no later than thirty days after the appellee's/cross-appellant's brief.²³³ Any cross-appellant's reply brief shall be filed no later than fifteen days after service of the appellant's cross-appellee's reply brief.²³⁴

4. *Rule 46: Arrangement and Contents of Briefs.*—The new Rules provide more guidance for the arrangement and contents of appellate briefs, which should be of assistance to the occasional appellate practitioner. The table of contents, for example, "shall list each section of the brief, including the headings and subheadings of each section and the page on which they begin."²³⁵ The table of authorities shall list each case, statute, rule, and other authority cited in the brief, with references to each page on which it is cited; such authorities shall be listed alphabetically or numerically, as applicable.²³⁶ The statement of the case shall provide page references to the Record on Appeal or Appendix, if contained therein.²³⁷ The statement of facts shall be presented in accordance with the standard of review appropriate for the judgment or order being appealed, and shall be in a narrative form rather than a witness by witness summary of the testimony.²³⁸ In an appeal challenging a ruling of a post-conviction relief petition, the statement may focus on facts from the post-conviction relief proceedings rather than on facts relating to the criminal conviction.²³⁹ The summary of argument "should not be a mere repetition of the argument headings."²⁴⁰ The argument portion of the brief "must include for each issue a concise statement of the applicable standard of review; this statement may appear in the discussion of each issue or under a separate heading placed before the discussion of the issues."²⁴¹ When the admissibility of evidence is in dispute on appeal, citation shall be made to the pages of the Transcript where the evidence was identified, offered, and received or rejected.²⁴² After the conclusion, the brief shall contain a copy of the appealed judgment or order including any

232. *See id.* at R. 45(B)(3).

233. *See id.*

234. *See id.* at R. 45(B)(4).

235. *Id.* at R. 46(A)(1).

236. *See id.* at R. 46(A)(2).

237. *See id.* at R. 46(A)(5).

238. *See id.* at R. 46(A)(6)(b), (c).

239. *See id.* at R. 46(A)(6)(d).

240. *Id.* at R. 46(A)(7).

241. *Id.* at R. 46(A)(8)(b).

242. *See id.* at R. 46(A)(8)(d).

written opinion, memorandum of decision, or findings of fact and conclusions of law, bound together and appearing before the word count certificate and certificate of service.²⁴³

Codifying case law, the new Rules expressly provide, “[n]o new issues shall be raised in the reply brief.”²⁴⁴ Moreover, “[t]he reply brief shall contain a table of contents, table of authorities, summary of argument, argument, conclusion, word count certificate, if needed, and certificate of service.”²⁴⁵

As in other portions of the new Rules, briefing in the area of cross-appeal has been clarified and specified. As before, when both parties initiate an appeal, the plaintiff below is the initial appellant unless the parties otherwise agree or the court otherwise orders.²⁴⁶ When only one party has initiated an appeal, that party is the appellant, even if another party raises issues on cross-appeal.²⁴⁷ After opening appellant’s brief in a cross-appeal, the appellee’s brief is to contain any contentions on cross-appeal as to why the trial court or Administrative Agency has committed reversible error.²⁴⁸ “The Appellant’s Reply Brief shall address the arguments raised on cross-appeal.”²⁴⁹ The cross-appellant’s Reply Brief may only respond to that part of the appellant’s Reply Brief addressing the appellee’s cross-appeal with no new issues raised and it must contain all the Brief sections of a Reply Brief—table of contents, table of authorities, summary of argument, argument, conclusion, word count certificate, if needed, and certificate of service.²⁵⁰

The arrangement and contents of amicus curiae Briefs have been set forth more clearly in the new Rules, also. Such Briefs must contain a table of contents, table of authorities, a brief statement of interest of the amicus curiae, summary of argument, argument, conclusion, word count certificate, if needed, and certificate of service.²⁵¹ Before completing the preparation of an amicus curiae Brief, counsel shall attempt to ascertain the arguments that will be made in the brief of any party whose position the amicus curiae is supporting, to avoid repetition or restatement of those arguments.²⁵²

5. Rule 47: Amendment of Briefs and Petitions.—The new Rules contain more specifics regarding the amendment of Briefs and Petitions. The movant shall either tender sufficient copies of an Amended Brief or Petition (the cover of which shall indicate that it is amended) with its motion, or request permission to retrieve the original and all copies of the Brief or Petition filed with the Clerk

243. See *id.* at R. 46(A)(10).

244. *Id.* at R. 46(C).

245. *Id.*

246. See *id.* at R. 46(D)(1).

247. See *id.*

248. See *id.* at R. 46(D)(2).

249. *Id.* at R. 46(D)(3).

250. See *id.* at R. 46(D)(4)&(5).

251. See *id.* at R. 46(E)(1).

252. See *id.* at R. 46(E)(2).

and substitute amended pages.²⁵³ Except as the court otherwise provides, the amendment of a Brief or Petition has no effect on any filing deadlines.²⁵⁴

6. *Rule 48: Additional Authorities.*—The new Rule on additional authority is substantially similar to the prior rule with the new limitation of a single sentence explaining the authority.²⁵⁵

H. Title VIII: Appendices

1. *Rule 49: Filing of Appendices.*—As a corollary to the changes in the record, the new Rules now require Appendices which shall be filed with the appellant's Brief and, if necessary, with later Briefs.²⁵⁶ Any party's failure to include any item in an Appendix shall not waive any issue or argument.²⁵⁷

2. *Rule 50: Contents of Appendices.*—In civil and administrative appeals, the purpose of an Appendix is to present the court with only those parts of the Record on Appeal that are necessary for the court to decide the issues presented.²⁵⁸ An appellant's Appendix must contain, if they exist, a copy of: (1) the chronological case summary; (2) the appealed judgment or order; (3) the jury verdict; (4) portions of the Transcript containing any oral ruling or statement of decision; (5) any challenged instructions if not already included the brief; (6) pleadings and other documents from the Clerk's Record, in chronological order, that are necessary for resolution of the issues on appeal; (7) short excerpts from the Record on Appeal or Transcript; (8) any record material relied on in the Brief; and (9) a verification of the accuracy of the documents.²⁵⁹ An appellee's Appendix, if filed, should not contain any materials already contained in the appellant's Appendix but may contain additional items that are relevant to the issues raised on appeal or cross-appeal.²⁶⁰

In criminal appeals, the contents of the appellant's Appendix is significantly different than in civil and administrative appeals in one respect: the entire Clerk's Record must be included in appellant's Appendix.²⁶¹ In all other respects, the Appendix process is the same. Every Appendix must have a table of contents specifically identifying each item and its date.²⁶²

3. *Rule 51: Form and Assembly of Appendices.*—The Appendices should be on 8 ½ x 11 inch white paper, bound on the left, with the documents in the order set forth in the prior rule, and all pages consecutively numbered at the bottom, without obscuring the Transcript page numbers, regardless of the number

253. See *id.* at R. 47.

254. See *id.*

255. See *id.* at R. 48.

256. See *id.* at R. 49(A).

257. See *id.* at R. 49(B).

258. See *id.* at R. 50(A)(1).

259. See *id.* at R. 50(A)(2)(a)-(i).

260. See *id.* at R. 50(A)(3).

261. See *id.* at R. 50(B)(1)(a).

262. See *id.* at R. 50(C).

of volumes required.²⁶³ Volumes should be no more than 250 pages each, and any binding process which permits the document to lie flat when opened is preferred.²⁶⁴ Each volume shall contain a table of contents for the entire Appendix which shall not be included in the page count for that volume.²⁶⁵ Each volume must be separately bound with front and back covers of the same color as the Brief, with the front covers being consistent with a form provided in the Rules.²⁶⁶

I. Title IX: Oral Argument

1. Rule 52: Setting and Acknowledging Oral Argument.—The Rules relating to oral argument have changed in minor respects. In criminal appeals, the Clerk shall send the order setting oral argument, not only to the parties, but also to the prosecuting attorney whose office represented the state at trial.²⁶⁷ Counsel shall file with the Clerk an acknowledgment of the order, setting oral argument no later than fifteen days after service of the order.²⁶⁸ The old rule had no time deadline.²⁶⁹

2. Rule 53: Procedures for Oral Argument.—The new Rules do not presume that oral arguments will be thirty minutes per side; the courts have the authority to order shorter or longer arguments. A party may, for good cause, request more or less time in its motion for oral argument or by a separate motion filed no later than fifteen days after the order setting oral argument.²⁷⁰

The appellant shall open the argument and may reserve time for rebuttal by informing the court at the beginning of the argument.²⁷¹ Failure to argue a particular point in an oral argument, if adequately briefed, will not constitute a waiver.²⁷² “Counsel shall not read at length from briefs, the Record on Appeal, or authorities.”²⁷³ Some additional specifics are added when multiple counsel or parties are on the same side.²⁷⁴ As in other parts of the Rules, a new provision on cross-appeals provides some clarification.²⁷⁵ Amicus curiae participation in oral argument is also set forth in more detail.²⁷⁶

263. See *id.* at R. 51(A, B, C).

264. See *id.* at R. 51(D).

265. See *id.*

266. See *id.* at R. 51(E); see also IND. APP. R. Form 51-1 (effective Jan. 1, 2001).

267. See IND. APP. R. 52(A) (effective Jan. 1, 2001).

268. See *id.* at R. 52(C).

269. See APP. R. 10 (West 1996).

270. See IND. APP. R. 53(A) (effective Jan. 1, 2001).

271. See *id.* at R. 53(B).

272. See *id.*

273. *Id.*

274. See *id.* at R. 53(C).

275. See *id.* at R. 53(D).

276. See *id.* at R. 53(E).

J. Title X: Petitions for Rehearing

1. *Rule 54: Rehearings.*—Although not as significant as the changes to the Record, Motions, and Appendices, there are some notable changes with respect to the Petition for Rehearing. For the first time, the Rules set forth exactly what decisions may be the subject of a Rehearing Petition: “(1) a published opinion; (2) a not-for-publication memorandum decision; (3) an order dismissing an appeal; and (4) an order declining to authorize the filing of a successive petition for post-conviction relief.”²⁷⁷ Furthermore, “[a] party may not seek rehearing of an order denying transfer.”²⁷⁸

Under the current practice, both a Petition and Brief are filed, but under the new Rules, only a Petition is filed which must “state concisely the reasons the party believes rehearing is necessary.”²⁷⁹ A Petition for Rehearing is limited to ten pages or 4200 words.²⁸⁰ The form of the Petition for Rehearing should conform to that of briefs with respect to paper size, print size, spacing, numbering, margins, covers, binding, and a copy in electronic format.²⁸¹ The Petition for Rehearing must include a table of contents, table of authorities, statement of issues, argument, conclusion, word count certificate, if needed, and certificate of service.²⁸²

The new Rules also codify case law when transfer and rehearing have been sought by different parties:

When rehearing is sought by one party, and transfer is sought by another, briefing shall continue under Rule 54 for the Petition for Rehearing and under Rule 57 for the Petition to Transfer. Once the court of appeals disposes of the Petition for Rehearing, transfer may be sought from that disposition in accordance with Rule 57 governing Petitions to Transfer.²⁸³

K. Title XI: Supreme Court Proceedings

1. *Rule 56: Requests to Transfer to the Supreme Court.*—While the substance of the transfer rules will be familiar to practitioners, they have been reorganized. For example, the Rule on emergency transfers prior to the issuance of an opinion by the court of appeals has been moved forward, although such petitions must still show “that the appeal involves a substantial question of law of great public importance and that an emergency exists requiring a speedy determination.”²⁸⁴ The more common avenue is still a Petition to Transfer after

277. *Id.* at R. 54(A).

278. *Id.*

279. *Id.* at R. 54(E).

280. *See id.* at R. 44(D), (E).

281. *See id.* at R. 43, 54(F).

282. *See id.* at R. 46(A), 54(F).

283. *Id.* at R. 55.

284. *Id.* at R. 56(A).

disposition by the court of appeals.²⁸⁵

2. *Rule 57: Petitions to Transfer and Briefs.*—Like rehearings, transfers will only consist of a Petition with no separate supporting brief.²⁸⁶ As before, transfer may only be sought from an adverse decision of the court of appeals.²⁸⁷ Transfer may be sought from an adverse: (1) published opinion; (2) not-for-publication memorandum decision; (3) amendment or modification of such opinion or decision; or (4) order dismissing an appeal.²⁸⁸ Any other order or action by the court of appeals, including an order denying a motion for interlocutory appeal, shall not be considered an adverse decision for purposes of Petitioning to Transfer, regardless of whether rehearing was sought in the court of appeals.²⁸⁹

The new Rules now provide for a Reply Brief on transfer to be filed no later than ten days after a Brief in response is served.²⁹⁰ The new Rules also dictate the contents and arrangement of a Petition to Transfer, Response or Reply for the first time:

(1) *Question Presented on Transfer.* A brief statement identifying the issue, question, or precedent warranting Transfer. The statement must not be argumentative or repetitive. The statement shall be set out by itself on the first page after the cover.

(2) *Table of Contents*

(3) *Background and Prior Treatment of Issues on Transfer.* A brief statement of the procedural and substantive facts necessary for consideration of the Petition to Transfer, including a statement of how the issues relevant to transfer were raised and resolved by any Administrative Agency, the trial court, and the Court of Appeals. To the extent extensive procedural or factual background is necessary, reference may be made to the appellate briefs.

(4) *Argument.* An argument section explaining the reasons why transfer should be granted.

(5) *Conclusion.* A short and plain statement of the relief requested.

(6) *Word Count Certificate, if necessary. . . .*

285. See *id.* at R. 56(B).

286. See *id.* at R. 57(F).

287. See *id.* at R. 57(A).

288. See *id.* at R. 57(B).

289. See *id.*

290. See *id.* at R. 57(E).

(7) *Certificate of Service*. . . .²⁹¹

The rule on "Considerations Governing the Grant of Transfer" has been amended to stress the discretion involved and the underlying theme that the legal issues must be important and significant to the entire State of Indiana:

The grant of transfer is a matter of judicial discretion. The following provisions articulate the principal considerations governing the Supreme Court's decision whether to grant transfer:

(1) *Conflict in Court of Appeals' Decisions*. The Court of Appeals has entered a decision in conflict with another decision of the Court of Appeals *on the same important issue*.

(2) *Conflict with Supreme Court Decision*. The Court of Appeals has entered a decision in conflict with a decision of the Supreme Court *on an important issue*.

(3) *Conflict with Federal Appellate Decision*. The Court of Appeals has decided *an important federal question* in a way that conflicts with a decision of the Supreme Court of the United States or a United States Court of Appeals [this is a new ground for transfer].

(4) *Undecided Question of Law*. The Court of Appeals has decided *an important question of law or a case of great public importance* that has not been, but should be, decided by the Supreme Court.

(5) *Precedent in Need of Reconsideration*. The Court of Appeals has correctly followed ruling precedent of the Supreme Court but such precedent is erroneous or in need of clarification or modification in some specific respect.

(6) *Significant Departure from Law or Practice*. The Court of Appeals has so significantly departed from accepted law or practice or has sanctioned such a departure by a trial court or Administrative Agency as to warrant the exercise of Supreme Court jurisdiction.²⁹²

While this new language looks similar to the old language, the addition of a few words give these provisions a different nuance that will be important for lawyers across the state to understand—they should stress the importance of the legal question.

291. *Id.* at R. 57(G).

292. *Id.* at R. 57(H) (emphasis added).

3. *Rule 58: Effect of Supreme Court Ruling on Petition to Transfer.*—This Rule is substantially similar to the prior version. Upon the grant of transfer, the Indiana Supreme Court shall have jurisdiction over the appeal and all issues as if the case had been originally filed in the supreme court.²⁹³ The denial of a Petition to Transfer shall have no legal effect other than to terminate the litigation between the parties in the supreme court.²⁹⁴ When the supreme court is evenly divided on the question of whether to accept or deny transfer, transfer shall be deemed denied, and if the supreme court is evenly divided after transfer has been granted, the decision of the court of appeals shall be reinstated.²⁹⁵

4. *Rule 59: Mandatory Appellate Review and Direct Review.*—As before, when the supreme court exercises exclusive jurisdiction, or when the supreme court grants an emergency Petition to Transfer prior to the issuance of an opinion by the appellate court, the appeal shall be taken in the same manner as cases that are appealed to the court of appeals.²⁹⁶ When the supreme court is equally divided in such cases, the trial court judgment is affirmed.²⁹⁷

5. *Rule 60: Original Actions.*—The Rule is the same: “[p]etitions for writ [sic] of mandamus or prohibition are governed by the Rules of Procedure for Original Actions.”²⁹⁸

6. *Rule 61: Mandate of Funds.*—The practice on Mandate of Funds did not change but a provision in the new Rules has been added to refer to them. The supreme court will review a case involving the Mandate of Funds commenced under Indiana Trial Rule 60.5(B), in accordance with such orders on briefing, argument, and procedure as the supreme court may issue in its discretion.²⁹⁹

7. *Rule 62: Appeals Involving Waiver of Parental Consent to Abortion.*—The Rule has not changed but has been broken down into sections such as Applicability, Permitted Parties, Appeal by Minor or Her Physician, Appeal by State or Other Party, Decision by the Supreme Court.³⁰⁰

8. *Rule 63: Review of Tax Court Decisions.*—The new Rule concerning reviews of tax court decisions is substantially similar to the prior version. The considerations governing the grant of review have been changed to parallel Rules regarding the consideration for granting transfer in Rule 57(H).³⁰¹ In other respects, the procedure has changed little.

9. *Rule 64: Certified Questions of State Law From Federal Courts.*—For Certified Questions, the Rule is substantially the same as before with some added specifics to assist the occasional appellate practitioner. A Certified Question of Indiana law can now come from any federal court, rather than just the federal

293. See *id.* at R. 58(A).

294. See *id.* at R. 58(B).

295. See *id.* at R. 58(C).

296. See *id.* at R. 59(A).

297. See *id.* at R. 59(B).

298. *Id.* at R. 60.

299. See *id.* at R. 61.

300. See *id.* at R. 62.

301. See *id.* at R. 63(I).

appellate courts and district courts sitting in Indiana.³⁰² So, district courts that sit outside of Indiana that have a question of Indiana law can certify the matter to the Indiana Supreme Court. The procedures have also been clarified to help practitioners with this rarely used mechanism.³⁰³

L. Title XII: Court Procedures, Powers, and Decisions

1. *Rule 65: Opinions and Memorandum Decisions.*—The Rule now contains a time deadline that conforms to internal procedures of the court of appeals regarding the time for filing a motion to publish: “[w]ithin thirty (30) days of the entry of the decision, a party may move the Court to publish any not-for-publication memorandum decision”³⁰⁴ With regard to the effective date of any appellate opinion, certification may occur earlier than after the expiration of all rehearing deadlines if all the parties request earlier certification.³⁰⁵ A new provision has been added for clarification regarding the effective date: “[t]he trial court, Administrative Agency, and parties shall not take any action in reliance upon the opinion or memorandum decision until the opinion or memorandum decision is certified.”³⁰⁶ This sentence was added to address the problem of a party acting based on an opinion of the court of appeals only to later learn that the supreme court did not see the same resolution.

2. *Rule 66: Relief Available on Appeal.*—The relief available on appeal remains largely the same. One provision that survived despite some debate was a provision allowing the appellate court to consider an appeal even though it did not have jurisdiction:

No appeal shall be dismissed as of right because the case was not finally disposed of in the trial court or Administrative Agency as to all issues and parties, but upon the suggestion or discovery of such a situation, the Court may, in its discretion, suspend consideration until disposition is made of such issues, or it may pass upon such adjudicated issues as are severable without prejudice to parties who may be aggrieved by subsequent proceedings in the trial court or Administrative Agency.³⁰⁷

3. *Rule 67: Costs.*—The Rule on costs contains additional specifics. For example, while the prior rule had no time period for filing a motion for costs, the new Rule sets a sixty day deadline for filing the motion after the final decision of the court of appeals or supreme court.³⁰⁸ “When the Supreme Court justices participating in an appeal are equally divided, neither party shall be awarded

302. See *id.* at R. 64(A).

303. See *id.* at R. 64(B).

304. *Id.* at R. 65(B).

305. See *id.* at R. 65(E).

306. *Id.*

307. *Id.* at R. 66(B).

308. See *id.* at R. 67(A).

costs.”³⁰⁹

II. CONSTITUTIONAL AMENDMENT AND SUPREME COURT EXPANSION

On November 7, 2000, the voters of Indiana will decide whether to amend the state constitution in a manner that would change the jurisdiction of the Indiana Supreme Court. Currently, the Indiana Supreme Court is constitutionally obligated to consider all criminal appeals with a sentence of fifty years or longer.³¹⁰ This constitutional provision was the result of an amendment in 1988 when the presumptive sentence was less than fifty years for murder. The Indiana General Assembly later increased the presumptive sentence to more than fifty years, causing almost every appeal of a murder sentence to go directly to the Indiana Supreme Court which has pushed out criminal matters with *substantial* legal questions with sentences of less than fifty years as well as all civil cases. The constitutional amendment will free up the Indiana Supreme Court to act like a court of last resort.

Perhaps related to the constitutional amendment, Chief Justice Randall T. Shepard has publicly supported expanding the Indiana Supreme Court from the current contingent of five justices.³¹¹ Many state supreme courts have more than five justices, and the Indiana State Bar Association’s Judicial Improvement Committee is considering the matter.³¹²

III. MODEST PROPOSAL

The constitutional amendment and potential expansion of the Indiana Supreme Court raise the question about whether the court should continue its practice that a majority of justices (currently three of five) must vote to grant transfer before deciding to hear a case—a process that contrasts with the practice in the U.S. Supreme Court in which a minority of four can require the nine justice court to hear a case on the merits.³¹³ If two votes were sufficient to grant transfer, in 1999 the Indiana Supreme Court would have granted transfer in about forty additional cases, and in 1998, about twenty. In light of the increase in the number of opinions dissenting to the denial of transfer (often leading the reader to wonder what response the majority would make), the Indiana Supreme Court should change its practice to permit one vote less than a majority to be sufficient to grant transfer.

309. *Id.* at R. 67(D).
310. IND. CONST. art. 7, § 4.
311. See Scott Olson, *Supreme Court Expansion Advocates Organizing*, IND. LAW., Nov.24-Dec. 7, 1999, at 21.
312. See *id.*
313. See ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 5.4, at 230 (BNA, 7th ed. 1993).

CONCLUSION

The new Indiana Appellate Rules that are to be effective January 1, 2001 are very significant developments of which appellate practitioners should be aware. The constitutional amendment and expansion of the Indiana Supreme Court are important developments as well. Finally, the Indiana Supreme Court should change its practice to allow one vote less than a majority to be sufficient to grant transfer in order to provide the people of Indiana a greater insight into the justices' thoughts on a legal problem that has generated some interest on the court.

SURVEY OF RECENT DEVELOPMENTS IN INSURANCE LAW

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INTRODUCTION

During this survey period,¹ the Indiana Supreme Court decided a case that had been the topic of many insurance practitioners' discussions over the past year concerning the use of staff counsel by insurance companies. This case highlights a productive year of judicial decisions in the insurance field covering a variety of issues and subjects. This Article addresses the past year's cases and analyzes their effect on the practice of insurance law.

I. INSURANCE COMPANY'S USE OF STAFF COUNSEL TO DEFEND INSURED

Indiana joined a number of states confronting the hotly debated issue of whether insurance companies may use staff counsel to represent their insureds who have been sued in *Cincinnati Insurance Co. v. Wills*.² The supreme court's decision will affect a number of different interests and parties. Not only are the insurance companies and their insureds affected, but the attorneys representing injured victims as plaintiffs will also be impacted by the *Wills* decision.

The *Wills* case started innocently enough as a personal injury lawsuit following an automobile accident between the injured victims and two defendants in Tippecanoe County. One of the defendants was insured by Celina Insurance Company.³ Celina chose its house counsel, who was an employee of and paid by Celina, to represent the insured.⁴ The insured was advised that the attorney's ethical obligations were owed solely to her and not Celina, and the insured consented to the attorney's representation.⁵

The injured victims filed a Motion to Disqualify the Celina staff attorney by contending that Celina engaged in the unauthorized practice of law by using staff counsel to represent their insureds.⁶ Another insurer, Cincinnati Insurance Company, intervened in the lawsuit by claiming an interest in the outcome of the Motion to Disqualify because Cincinnati Insurance used a "captive law firm"

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1. The survey period for this Article is approximately September 1, 1998 to October 6, 1999.

2. 717 N.E.2d 151 (Ind. 1999).

3. *See id.* at 153.

4. *See id.*

5. *See id.*

6. *See id.* The unauthorized practice of law is prohibited. *See* IND. CODE § 33-1-5-1 (1998).

through Berlon & Timmel.⁷ Berlon and Timmel's attorneys were employees of Cincinnati Insurance, working solely on cases involving the company or its insureds.⁸

The trial court concluded that Celina engaged in the unauthorized practice of law by using staff counsel to represent insureds and that the specific attorney employed by Celina violated Rule of Professional Conduct 5.5 prohibiting a lawyer from assisting a person in the unauthorized practice of law.⁹ The trial court also concluded that Cincinnati Insurance engaged in the unauthorized practice of law by its use of a "captive law firm" and that the use of the firm name "Berlon & Timmel" was a deceptive practice.¹⁰ The trial court ordered that both Celina and Cincinnati cease all efforts to engage in the unauthorized practice of law and that Berlon & Timmel's local office should be closed.¹¹ The insurers immediately filed a motion with the court of appeals to stay the trial court's orders, which was granted.¹² An appeal was then filed directly to the Indiana Supreme Court.¹³

The supreme court engaged in an extensive analysis of the issues presented and were afforded a number of briefs by amici.¹⁴ In addressing these questions, the supreme court decided that the insurers did not engage in the unauthorized practice of law by using staff counsel to represent insureds.¹⁵ While the court concluded that the insurance company as a corporation could not practice law, the court found that the corporation's employment of attorneys, who were bound by the ethical rules, did not result in the unauthorized practice of law.¹⁶ Furthermore, the court decided that while the staff counsel's joint representation of the insurance company and its insureds could present a problem in certain situations, there was no inherent conflict to create a rule of prohibition in all cases.¹⁷

7. *See Wills*, 717 N.E.2d at 153.

8. *See id.* Berlon & Timmel would represent both Cincinnati Insurance in first party claims and its insureds in third party claims. *See id.*

9. *See id.* Indiana Rule of Professional Conduct 5.5 states that "A lawyer shall not: . . . (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law." IND. PROF. COND. R. 5.5 (2000).

10. *Wills*, 717 N.E.2d at 153-54. The trial court relied upon Indiana Rule of Professional Conduct 7.2 which requires that a lawyer "not practice under a name that is misleading as to the identity, responsibility, or status of those practicing thereunder, or is otherwise false, fraudulent, misleading, deceptive. . . ." *Id.* at 164.

11. *See id.* at 154.

12. *See id.*

13. *See id.*

14. The amici parties included not only insurance companies, but charitable organizations and business trade organizations concerned about the effects of a decision forbidding their use of staff counsel. *See id.* at 153.

15. *See id.* at 155.

16. *See id.* at 160.

17. *See id.* at 161.

As to the order prohibiting Berlon & Timmel from continuing to practice as a captive law firm, the supreme court agreed with the trial court that the name was misleading.¹⁸ The use of a law firm name by Cincinnati Insurance presented an appearance that the firm was independent such that the ordinary person would assume the firm to be "outside counsel."¹⁹ The supreme court recognized that the use of "captive law firms" was permissible.²⁰ However, it ordered Cincinnati Insurance to discontinue the use of the "Berlon & Timmel" name and instead use a name describing their attorneys as employees of the insurance company.²¹

The immediate effect of the *Wills* decision is that insurance companies, who formerly relied upon outside defense counsel to represent their insureds, may now hire staff counsel to perform those functions. Insurers believe that they save money on defense costs by using their own staff counsel. Attorneys representing injured victims are also affected by this decision for the same reason. On small personal injury lawsuits, plaintiff attorneys cannot contend during settlement negotiations that the case has a "nuisance" settlement value because the insurance company will incur defense costs to proceed to trial. Insurers can respond that there are no additional defense costs for them in representing the insured because their staff counsel is on salary.

The question remains for insurance companies as to whether the use of staff counsel or captive law firms will produce better results. The insurance companies' use of staff counsel will most likely produce an offspring of cases where it is alleged that the insurance company commits bad faith. For example, if the insurance company employs staff counsel to represent an insured and a demand for policy limits to settle the claim is made, the insurance company must notify its insured of the demand. If the insurance company proceeds to trial and a judgment in excess of the policy limits is awarded, there will be significant scrutiny of the staff counsel's decisions and actions to make sure the insured was fully and impartially informed and that the insurance company did not act for its own benefit to the detriment of its insured.

The ultimate benefit or detriment of the use of staff counsel will not be observable until many years of use have occurred. Thus, the *Wills* decision will be one that will impact the insurance industry for a number of years.

18. See *id.* at 164.

19. *Id.* In its firm stationary, Berlon & Timmel included a statement at the bottom that stated "Berlon & Timmel is an unincorporated association, not a partnership, of individual licensed attorneys employed by The Cincinnati Insurance Company for the exclusive purpose of representing the Cincinnati Insurance Companies and their policyholders." *Id.* The supreme court found this disclaimer as insufficient to dispel the deceptiveness to an ordinary person. See *id.*

20. *Id.* at 165.

21. See *id.*

II. AUTOMOBILE INSURANCE CASES

A. *Escape Clauses and Arbitration Award Challenges*

Two cases during the survey period analyzed the enforceability of "escape clauses" in insurance policies that allow the parties to challenge arbitration decisions even after both parties agreed to submit their dispute to arbitration. Both cases permitted a challenge to the arbitration awards despite a growing national trend finding "escape clauses" to be unenforceable.²² Indiana's strong policy upholding parties' freedom to contract seemed to be the deciding factor for both courts in supporting the enforcement of the "escape clauses."

In *National General Insurance Co. v. Riddell*,²³ Riddell was insured under an automobile policy issued by National General.²⁴ In 1995, Riddell was seriously injured in an accident involving an uninsured motorist.²⁵ The parties agreed to submit the claim to arbitration, and an award was entered by the arbitrator in favor of Riddle for \$220,000, finding that the negligence of the uninsured motorist was the cause of the accident.²⁶

National General appealed the arbitration award pursuant to the "escape clause" of the insurance policy.²⁷ Riddell sought and received summary judgment in the trial court, which held that the "escape clause" was illusory and void as against public policy.²⁸

Discussing Indiana's policy to zealously defend the freedom to contract, the court of appeals reversed the trial court's summary judgment.²⁹ The court of appeals held that an "escape clause" allowing for appeal of an arbitration award of damages was enforceable, if the amount of damages awarded exceeded the statutory minimum for bodily injury liability as required by the policy.³⁰

The second case to examine an "escape clause" in an insurance contract was *Allstate Insurance Co. v. Bradtmueller*.³¹ In *Bradtmueller*, the insured, who was dissatisfied with an arbitration award she obtained on her claim for underinsured motorist benefits, brought a declaratory judgment action against Allstate.³² Again, the facts were undisputed, leaving the court of appeals with essentially the

22. The national trend against "escape clauses" finds them to provide illusory coverage so as to be void. See *National Gen. Ins. Co. v. Riddell*, 705 N.E.2d 465, 467 (Ind. Ct. App. 1998).

23. See *id.* at 465.

24. See *id.*

25. See *id.*

26. See *id.* at 466.

27. See *id.* The provision allowed the parties to appeal the award only if it exceeded the minimum limit for bodily injury pursuant to the state's financial responsibility statute.

28. See *id.*

29. See *id.* at 468.

30. See *id.*

31. 715 N.E.2d 993 (Ind. Ct. App. 1999), *trans. denied*, No. 02A03-9809-CV-377, 2000 Ind. LEXIS 284 (Ind. Mar. 23, 2000).

32. See *id.* at 994.

same question that was presented in *Riddell* of whether the "escape clause" in an insurance contract is enforceable to allow a party to avoid an arbitration award.

In November 1993, Bradtmueller was injured in an automobile accident involving an underinsured motorist and recovered the insurance policy limits from the tortfeasor's insurance company.³³ Bradtmueller sought additional benefits from Allstate, her underinsured motorist insurance company, but the parties were unable to agree as to the amount to which Bradtmueller was entitled.³⁴ The parties resorted to arbitration as prescribed in the insurance contract.³⁵

After an unsatisfactory arbitration award was entered in her favor, Bradtmueller filed suit in the trial court seeking an appeal.³⁶ Allstate moved for summary judgment arguing that Bradtmueller was precluded from filing her action based upon the arbitration provision in the insurance contract.³⁷ The trial court denied Allstate's motion and the insurance company filed an interlocutory appeal.³⁸ Citing *Riddell*, the court of appeals upheld the trial court's denial of Allstate's motion, concluding that Bradtmueller could rely on the "escape clause" to bring her lawsuit against Allstate.³⁹

These cases represent Indiana's awareness that the freedom to contract should not be impeded. The insurance policy permitted the parties to proceed to arbitration, but also recognized that the "escape clause" will permit appeals of those decisions under certain circumstances.

B. Intentional Acts Exclusion

In *Coy v. National Insurance Ass'n*,⁴⁰ Robert Adams stole his grandmother's automobile that was insured by Robert's father with National.⁴¹ Robert and his girlfriend, Melissa Coy, drove to North Carolina where they pulled away from a gas station without paying for their gas, prompting a high speed police chase.⁴² The chase ended in an accident that killed Melissa, and Robert pled guilty to involuntary manslaughter.⁴³

Melissa's mother sued Robert for negligence.⁴⁴ In turn, National filed a declaratory judgment action seeking a determination that Robert's actions were intentional, such that National did not owe any insurance coverage to Robert

33. *See id.*

34. *See id.* at 995.

35. *See id.*

36. *See id.*

37. *See id.*

38. *See id.* at 999.

39. *See id.*

40. 713 N.E.2d 355 (Ind. Ct. App. 1999).

41. *See id.* at 358.

42. *See id.*

43. *See id.*

44. *See id.*

pursuant to the intentional acts exclusion of the policy.⁴⁵ National was initially granted summary judgment, but the trial court reversed its decision.⁴⁶ A bench trial occurred which resulted in the trial court determination that Robert's actions were intentional based upon his driving of over 100 miles per hour, passing vehicles in no passing zones, and crossing the center line in front of oncoming traffic.⁴⁷ Consequently, National did not owe insurance coverage for Robert's actions.⁴⁸

On appeal, the court reversed the trial court by concluding there was no evidence showing Robert possessed either an actual or inferred intent to injure Melissa.⁴⁹ Robert testified that he did not intend to injure Melissa, such that actual intent did not exist.⁵⁰ The court refused to find that the reckless driving of Robert was sufficient to infer that he intended to cause injury to Melissa.⁵¹ The court looked to other cases that held that reckless conduct did not satisfy a "practically certain" standard necessary to exclude coverage under the lesser "expected acts" provision of an insurance policy.⁵² The court concluded that if Robert's reckless acts did not satisfy the lesser "expected" standard, then the higher "intended" standard could not be satisfied as well.⁵³ The court found that killing Melissa was not the intended result of Robert's actions, rather it was an unintended consequence of Robert's intentional act to evade the police.⁵⁴

This case demonstrates the difficulties experienced by insurance companies in applying the "intentional acts" exclusion. In order to apply the exclusion, evidence must be procured to show that the act alone demonstrates an intent to injure, which may prove difficult in cases similar to *Coy*. In contrast, this required showing is met in sexual molestation cases⁵⁵ where the act of sexual molestation alone is sufficient to infer an intent to injure, triggering the "intentional acts" exclusion.

C. Who Is an Insured?

The court, in *Thomas v. Victoria Fire & Casualty Insurance Co.*,⁵⁶ examined the definitional issues involved in determining who is covered under a policy of liability insurance. In *Thomas*, the named insured under the policy was driving

45. The "intentional acts" provision excluded coverage for "bodily injury or property damage caused intentionally by or at the direction of the insured." *Id.* (citation omitted).

46. *See id.*

47. *See id.* at 359.

48. *See id.*

49. *See id.*

50. *See id.*

51. *See id.*

52. *Id.* (citing *Bolin v. State Farm Fire & Cas. Co.*, 557 N.E.2d 1084 (Ind. Ct. App. 1990)).

53. *Id.* at 360.

54. *See id.* at 358.

55. *See Wiseman v. Leming*, 574 N.E.2d 327 (Ind. Ct. App. 1991).

56. 706 N.E.2d 212 (Ind. Ct. App.), *trans. denied*, 726 N.E.2d 301 (Ind. 1999) (mem.).

a vehicle with a pregnant relative as a passenger.⁵⁷ They were involved in an accident with a car driven by an uninsured motorist.⁵⁸ The pregnant passenger and her unborn child were injured and sought uninsured motorist coverage for the injuries under the driver's insurance policy.⁵⁹

Victoria denied coverage based on an exclusion in the liability portion of the policy, which precluded coverage for bodily injury to a relative of the named insured.⁶⁰ On appeal of the trial court's grant of summary judgment for the insurance company, the court of appeals found that the pregnant passenger was not entitled to benefits under the policy.⁶¹ The passenger was technically within the definition of those covered under the uninsured motorist protection provision of the policy. However, in Indiana, before a person is entitled to uninsured motorist coverage, they must qualify as an insured under that policy who would receive liability coverage.⁶² Because the pregnant passenger did not qualify as an insured under the liability coverage, there was no coverage available to her for the uninsured motorist claim.⁶³

D. Bad Faith Issues

There seems to be a trend by Indiana plaintiffs to include a bad faith claim against the insurance carrier whenever a claim has been denied. Indiana case law has created a high burden upon plaintiffs to succeed on a bad faith claim against the insurance company.⁶⁴ Because of this high burden, insurance companies are often successful in obtaining summary judgment on the bad faith claim. During this survey period, the courts addressed situations where summary judgment is sought on a bad faith claim against an insurance company.

The court in *Gooch v. State Farm Mutual Auto Insurance Co.*,⁶⁵ reversed the

57. *See id.* at 213.

58. *See id.*

59. *See id.* at 214.

60. The insurance company cited the policy which excluded coverage for bodily injury to the named insured and any relative. *See id.*

61. *See id.* at 215.

62. The rationale behind this policy is to reward those individuals who obtain liability coverage by limiting the scope of uninsured motorist coverage to those listed as insured under the policy, regardless of the policy's language. *See Anderson v. State Farm Mut. Auto. Ins. Co.*, 471 N.E.2d 1170 (Ind. Ct. App. 1984).

63. *See id.*

64. Generally, the insured must demonstrate that the insurance company denied a claim "knowing that there [was] no rational, principled basis for doing so." *Erie Ins. Co. v. Hickman*, 622 N.E.2d 515, 520 (Ind. 1993). Furthermore, the courts have found that the insurance company must have possessed a culpable mental element showing "a state of mind reflecting dishonest purpose, moral obliquity, furtive design, or ill will." *Colley v. Indiana Farmers Mut. Ins. Group*, 691 N.E.2d 1259, 1261 (Ind. Ct. App.), *trans. denied*, 706 N.E.2d 167 (Ind. 1998).

65. 712 N.E.2d 38 (Ind. Ct. App. 1999), *trans. denied*, No. 49A02-9806-CV-479, 2000 Ind. LEXIS 136 (Ind. Feb. 16, 2000).

trial court's summary judgment order in favor of the insurer because it found genuine issues of material fact as to whether the insurer engaged in bad faith conduct. *Gooch* is an interesting case that examines whether an insurer's litigation conduct in defending itself against an uninsured motorist claim is admissible to determine whether the insurer made a bad faith attempt to force the insured to settle the claim.

In *Gooch*, the insured sued her automobile insurer in Indiana to recover uninsured motorist benefits after she was injured in an accident with a hit-and-run driver in Michigan.⁶⁶ State Farm advised Gooch to file her lawsuit in Michigan against the suspected hit-and-run driver so that State Farm could retain its subrogation rights.⁶⁷ Gooch explained to State Farm that the Michigan suspect had an alibi for the time of the accident and did not fit the description of the driver that she had provided to police.⁶⁸ Nonetheless, State Farm moved to dismiss Gooch's action in Indiana and insisted that the action be pursued in Michigan.⁶⁹

Gooch amended her Indiana Complaint to allege bad faith by State Farm.⁷⁰ Later, Gooch also discovered that State Farm had a policy to litigate all low damage collisions in order to make it financially difficult for an insured to obtain a recovery.⁷¹ Gooch argued that State Farm's litigation tactics of having her pursue litigation in an inconvenient forum and having a policy to litigate her type of claim were an unlawful attempt to force her to settle because she could not afford the litigation costs.⁷²

The trial court granted State Farm's summary judgment motion on the bad faith claim and Gooch appealed.⁷³ Analyzing the facts within the framework enunciated in *Erie Insurance Co. v. Hickman*,⁷⁴ the court found that there was an issue of fact as to whether State Farm was exercising unfair advantage over the insured to pressure her to settle.⁷⁵

A significant portion of this decision focused upon the court allowing evidence of State Farm's litigation conduct to prove bad faith.⁷⁶ The court concluded that certain actions by State Farm done after Gooch brought her lawsuit, were admissible to show that State Farm engaged in bad faith.⁷⁷ Thus, an issue of fact remained to warrant reversal of State Farm's summary

66. *See id.* at 39.

67. *See id.*

68. *See id.*

69. *See id.*

70. *See id.*

71. *See id.*

72. *See id.*

73. *See id.*

74. 622 N.E.2d 515 (Ind. 1993).

75. *See Gooch*, 712 N.E.2d at 42.

76. *See id.* at 41-43.

77. *See id.* at 43.

judgment.⁷⁸

A summary judgment to an insurer on a claim of bad faith was affirmed in *White v. State Farm Mutual Automobile Insurance Co.*⁷⁹ In *White*, the insured brought suit against State Farm for breach of contract and bad faith after State Farm refused to pay for all of the insured's chiropractic bills after submitting them to an independent medical review agency.⁸⁰ The essence of the insured's bad faith claim was that State Farm maintained no written guidelines or procedures to insure a proper medical review and payment of medical expenses, nor did State Farm properly supervise the payment process.⁸¹

The trial court granted summary judgment in favor of State Farm and the insured appealed.⁸² The court of appeals agreed with the trial court by finding no designated evidence in the record that State Farm violated its duty to deal in good faith to the insured.⁸³

Nevertheless, the court observed that if the insured presented evidence that State exercised disparate treatment in having chiropractic versus non-chiropractic cases reviewed by the medical review agency, then an issue of fact would remain on whether State Farm acted in bad faith.⁸⁴ Questions addressing insurance companies' use of medical review panels or institution of litigation policies on soft tissue cases will continue to provide decisions defining the scope of insurance company bad faith.

E. Entitlement to Underinsured Motorist Coverage After Settlement with Tortfeasor

In *Webster v. Pekin Insurance Co.*,⁸⁵ an insured was tendered the policy limits by a tortfeasor, and advised his underinsured motorist carrier of this fact to receive permission to proceed with the settlement.⁸⁶ The insurer never responded, and the insured settled with the tortfeasor by executing a release agreement.⁸⁷ When the insured sought underinsured motorist coverage, the insurer denied the claim by contending it was prejudiced by the insured's settlement with the tortfeasor in limiting its ability to seek subrogation for any amounts paid by the insurer.⁸⁸ The insured filed suit against the insurer and the

78. *See id.*

79. 709 N.E.2d 1079 (Ind. Ct. App. 1999).

80. *See id.* at 1081.

81. *See id.*

82. *See id.*

83. *See id.* at 1084.

84. *See id.*

85. 713 N.E.2d 932 (Ind. Ct. App. 1999).

86. *See* IND. CODE § 27-7-5-6(b) (1998) (requiring an insurer, once it has received notice of a tortfeasor's tender of policy limits, to advance that amount to the insured to preserve its right of subrogation).

87. *See Webster*, 713 N.E.2d at 934.

88. *See id.*

agent who sold the policy to the insured, seeking the underinsured motorist coverage and alleging bad faith.⁸⁹

On appeal, the court reversed the trial court's grant of summary judgment to the insurer and agent on both the breach of contract and the bad faith claims.⁹⁰ With respect to the bad faith claim, the court found that there was a question of fact as to whether the agent breached an oral promise to pay underinsured motorist benefits to the insured.⁹¹ As to the claim for uninsured motorist coverage, the court reversed and ordered that summary judgment be entered against the insurance company, because it had waived its right to seek subrogation which nullified its argument that no coverage existed.⁹²

F. Garage Liability Coverage and Other Insurance

Typically automobile dealerships allow potential customers to test drive vehicles in an effort to encourage the sale of the automobile. An interesting coverage question arises as to whether the customer's or the dealership's insurance policy applies when a customer is involved in an automobile accident. In *General Accident Insurance Co. v. Hughes*,⁹³ the owner of a dealership allowed Glowe to test drive one of its cars.⁹⁴ While he was test driving, Glowe collided with a vehicle driven by Crystal, injuring Crystal and causing the death of Crystal's mother, a passenger in the car.⁹⁵

At the time of the accident Glowe was insured by Atlanta Casualty for up to \$25,000 per person and \$50,000 per accident, which are the minimum limits provided by Indiana's financial responsibility statute.⁹⁶ The dealership possessed a garage liability policy with personal injury limits of \$1 million per accident.⁹⁷ The garage liability policy contained a provision that provided coverage for the state's limits of financial responsibility to the dealership's customers, only if the customer had no other available insurance.⁹⁸

The claimants sought a judicial declaration concerning coverage under Glowe's personal policy and the garage liability policy.⁹⁹ The dealership's insurer moved for summary judgment, claiming that its policy did not apply because Glowe had other insurance that satisfied the minimum financial

89. *See id.*

90. *See id.* at 938.

91. *See id.* This ruling is contrary to the Seventh Circuit's recent ruling that a bad faith case cannot be pursued against an insurance company's employee. *See Schwartz v. State Farm Mut. Auto. Ins. Co.*, 174 F.3d 875, 878-79 (7th Cir. 1999).

92. *See Webster*, 713 N.E.2d at 937.

93. 706 N.E.2d 208 (Ind. Ct. App.), *trans. denied*, 726 N.E.2d 299 (Ind. 1999) (mem.).

94. *See id.*

95. *See id.*

96. *See* IND. CODE § 9-25-2-3(1) & (2) (1998).

97. *See Hughes*, 706 N.E.2d at 209.

98. *See id.* at 209-10.

99. *See id.* at 210.

responsibility law as prescribed in the garage liability policy.¹⁰⁰

The trial court denied the dealership insurer's motion for summary judgment, but the court of appeals reversed holding that Glowe's personal policy with Atlanta Casualty was primary and the garage liability policy did not provide excess coverage.¹⁰¹ This analysis is a clear and correct application of the language of the policies. Because the state's minimum financial responsibility limits were satisfied, the dealership's provisions that limited the extent of coverage were proper.

G. Umbrella Policy Coverage for Underinsured Motorist Claim

In a case of first impression, the Indiana Supreme Court decided, in *United National Insurance Co. v. DePrizio*,¹⁰² that uninsured and underinsured motorists coverage existed in an umbrella or excess policy written to provide automobile liability coverage.¹⁰³ The supreme court received a certified question from the Seventh Circuit, U.S. Court of Appeals.¹⁰⁴ The supreme court based its decision upon Indiana's uninsured/underinsured motorist statute and its intent:

We find that this history of expanding the availability of uninsured and underinsured motorist coverage manifests an intent by our legislature to give insureds the opportunity for full compensation for injuries inflicted by financially irresponsible motorists. To hold that an umbrella policy which by its terms covers risks above those insured in an underlying automobile policy does not apply to the underlying uninsured or underinsured motorist coverage would contravene that intent.¹⁰⁵

With this remedial objective in mind, the court liberally construed the legislation to find that the umbrella policy provided insureds with uninsured/underinsured benefits unless the insured specifically waives these benefits.¹⁰⁶ This decision follows the trend of a growing number of states.¹⁰⁷

H. Set-Off in Underinsured Motorist Claim

In *Wildman v. National Fire and Marine Insurance Co.*,¹⁰⁸ the court was

100. See *id.*

101. See *id.* at 211; see also IND. CODE § 27-8-9-10(a) & (b).

102. 705 N.E.2d 455 (Ind. 1999).

103. See *id.* at 456.

104. See *id.* Interestingly enough, the Seventh Circuit previously issued a ruling that was contrary to the *DePrizio* decision. See *Schmitt v. American Family Mut. Ins. Co.*, 161 F.3d 1115 (7th Cir. 1998). However, as Judge Hamilton of the Southern District of Indiana has noted *Schmitt* is overruled by *DePrizio* on the question of Indiana law. See *American Family Mut. Ins. Co. v. Jeffrey*, No. IP-98-1085-C H/G, 1999 WL 1893258 (S.D. Ind. Apr. 8, 1999).

105. See *DePrizio*, 705 N.E.2d at 461.

106. See *id.* at 463.

107. See *id.* at 461-62.

108. 703 N.E.2d 683 (Ind. Ct. App. 1998), *trans. denied*, 714 N.E.2d 173 (Ind. 1999) (mem.).

asked to determine what could be set-off from the amount of underinsured motorists benefits available, after the insured received worker's compensation benefits. The insured sustained injuries in an automobile/motorcycle collision while in the scope of his employment.¹⁰⁹ As a result of his injuries, Wildman received \$47,246.50 in worker's compensation benefits.¹¹⁰ Wildman settled his claim for the underinsured third party policy tortfeasor's limits of \$100,000 and then sought underinsured coverage from National, his employer's insurer.¹¹¹

An arbitrator found National was liable for \$205,000 in underinsured motorists benefits.¹¹² Based on the arbitration award, National Fire determined its payment to be \$57,753.50 by setting off the entire amount of workers compensation and tortfeasor payments issued to the insured: \$205,000 arbitration award less \$100,000 underlying coverage, less \$47,246.50 worker's compensation benefits left \$57,753.50.¹¹³ Wildman argued that National should only be allowed to set-off workers compensation benefits that Wildman actually retained (\$15,748.83), after repaying \$31,497.67 toward the workers compensation carrier's lien.¹¹⁴

The court held that the National should only be entitled to set-off against those worker's compensation benefits that Wildman actually retained.¹¹⁵ In arriving at its conclusion, the court found that the set-off provision in the insurance contract was ambiguous.¹¹⁶ Consequently, the court read the set-off provision liberally so as to best serve the public interest. The court's common sense approach to the issue led to its decision that any reduction taken by an insurer should only match the amount of money the claimant actually is compensated.¹¹⁷

III. COMMERCIAL AND PROPERTY INSURANCE CASES

A. Standing to Contest Coverage

Two court of appeals' cases, *Community Action of Greater Indianapolis, Inc. v. Indiana Farmers Mutual Insurance Co.*¹¹⁸ and *Araiza v. Chrysler Insurance Co.*,¹¹⁹ addressed the question of whether an injured party has standing to contest the coverage position taken by an insurance carrier who has a liability policy in

109. See *id.* at 684.

110. See *id.*

111. See *id.* at 680-85.

112. See *id.* at 685.

113. See *id.*

114. See *id.*

115. See *id.* at 687.

116. See *id.*

117. See *id.*

118. 708 N.E.2d 882 (Ind. Ct. App.), *trans. denied*, 726 N.E.2d 305 (Ind. 1999) (mem.).

119. 699 N.E.2d 1162 (Ind. Ct. App.), *reh'g* 703 N.E.2d 661 (Ind. Ct. App. 1998) *and trans. denied* 714 N.E.2d 172 (Ind. 1999) (mem.).

the name of the insured tortfeasor/defendant. The cases agree on one point and conflict on another.

In *Community Action*, Community contracted with a company called Best For Less Home Improvement ("Best") to install a new roof on Community's office building.¹²⁰ Best subcontracted the roofing work to Lakes.¹²¹ While the roofing work was being done, there was a heavy rain storm that caused about \$170,000 in property damage.¹²²

Community Action filed suit against Best, Lakes and Lakes' liability insurer, Farmers Mutual, seeking a declaratory judgment as to whether Lakes was entitled to indemnity from Farmers Mutual for Community Action's claims.¹²³ Farmers Mutual argued that the declaratory judgment action was, in essence, a direct action against Farmers Mutual by a third party to the insurance contract and such direct actions are prohibited by Indiana law.¹²⁴

The court of appeals ruled that Community Action had standing to bring the declaratory judgment action.¹²⁵ The court reasoned that in Indiana, as well many other jurisdictions, an injured victim of an insured's tort has a legally protected interest in the insurance policy before he reduces his tort claim to judgment.¹²⁶ Thus, the injured victim can assert a claim seeking a coverage determination against the defendant's liability carrier, but still cannot pursue an action against the liability carrier to establish the defendant's liability.

Shortly before *Community Action* was decided, the court in *Araiza v. Chrysler Insurance Co.*,¹²⁷ found that third parties could not bring an action to determine coverage prior to obtaining a judgment against the insured.¹²⁸ In *Araiza*, the injured third party obtained a default judgment against an insured of Chrysler Insurance Company.¹²⁹ After obtaining the default judgment, Araiza initiated proceedings supplemental against Chrysler to collect insurance proceeds available to cover the default judgment.¹³⁰ Chrysler denied that coverage was owed to its insured and also filed a declaratory judgment action in which it named its insured and Araiza as defendants.¹³¹

The trial court consolidated the proceedings supplemental case with the declaratory judgment action. Ultimately, Chrysler defaulted its insured in the declaratory judgment action, and then argued that the default against the insured

120. See *Community Action*, 708 N.E.2d at 883.

121. See *id.*

122. See *id.*

123. See *id.*

124. See *id.* at 884; see also *Bennett v. Slater*, 289 N.E.2d 144 (Ind. Ct. App. 1972).

125. See *Community Action*, 708 N.E.2d at 886.

126. See *id.* at 885.

127. 699 N.E.2d 1162 (Ind. Ct. App.), *reh'g* 703 N.E.2d 661 (Ind. Ct. App. 1998) and *trans. denied*, 714 N.E.2d 172 (Ind. 1999) (mem.).

128. See *Araiza*, 703 N.E.2d at 662.

129. See *Araiza*, 699 N.E.2d at 1163.

130. See *id.*

131. See *id.*

barred Araiza from seeking benefits under the policy.¹³²

The court of appeals held that the insurer's default judgment against the insured was not conclusive as to Araiza's interest in the policy.¹³³ Thus, Araiza could litigate to seek coverage for the default judgment against Chrysler's insured under the policy. The court specifically stated that Araiza "had an interest in the policy proceeds which vested at the time of the accident."¹³⁴

At rehearing, the court of appeals emphasized that Araiza only had an interest in the policy and standing to sue Chrysler based upon the default judgment he obtained against the insured.¹³⁵ The court specifically found that direct actions by a third party against a liability insurer are prohibited, unless and until he reduces his claim to a judgment against the insured.¹³⁶

The rationale of these two decisions as to whether a third party has an interest in the policy to support a direct action against the defendant's liability carrier, is clearly conflicting. As to questions of coverage, a third party seeking to establish liability should be deemed as having sufficient interest in the policy at question to permit them to be a party, either as a defendant or plaintiff, in a declaratory judgment action only. By so doing, the effect of the declaratory judgment action concerning the extent of coverage, may be conclusively established to be binding upon all.

B. Wear and Tear Exclusion

During the survey period, the court in *Associated Aviation Underwriters v. George Koch Sons, Inc.*¹³⁷ considered an insurance policy's "wear and tear" exclusion and its application to an interesting factual scenario. Koch owned and operated an airplane and maintained an "all-risk" insurance policy¹³⁸ for the plane with Associated Aviation Underwriters.¹³⁹ Beginning in 1995, one of the airplane's engines began to exceed the maximum allowable temperature.¹⁴⁰ The problem progressed until the airplane suffered substantial property damage.¹⁴¹

Koch submitted a claim for the damaged engine, but the insurer denied owing any coverage because of the "wear and tear" exclusion.¹⁴² During the course of

132. *See id.*

133. *See id.*

134. *Id.*

135. *See Araiza v. Chrysler Ins. Co.*, 703 N.E.2d 661, 662 (Ind. Ct. App. 1998), *trans. denied*, 714 N.E.2d 172 (Ind. 1999) (mem.).

136. *See id.*

137. 712 N.E.2d 1071 (Ind. Ct. App.), *trans. denied*, 726 N.E.2d 312 (Ind. 1999) (mem.).

138. An "all risk" policy generally extends coverage to risks that would not be covered under standard insurance policies.

139. *See id.* at 1072.

140. *See id.* at 1072-73.

141. *See id.*

142. The exclusion provided:

This policy does not apply: . . . to physical damage . . . caused by and confined to (a)

the declaratory judgment litigation, it was established that the temperature problem was caused by the manufacturer who installed a seal ring incorrectly which prompted the engine to overheat.¹⁴³ Nevertheless, the insurer argued that the resulting engine damage was still caused by the wear and tear, deterioration, and mechanical breakdown of the engine while acknowledging the improper installation by the manufacturer.¹⁴⁴ The issue for resolution was whether the exclusion would apply even if the wear and tear or mechanical breakdown was caused by a third-party's negligence.

The court held that under this all-risk policy, the airplane owner was entitled to coverage.¹⁴⁵ In arriving at this conclusion, the court reasoned that the mechanical breakdown or wear and tear can be either the cause of the loss or the effect of the loss.¹⁴⁶ In this case, the wear and tear of the engine was the effect of the manufacturer's negligence rather than the cause.

Associated involves an interpretation of a unique exclusion under a specialized policy. However, this type of exclusion does exist within homeowners policies, and this case should be reviewed when facing a claim for "wear and tear."

C. Effect of Release on Bad Faith Claim

The court in *County Line Towing, Inc. v. Cincinnati Insurance Co.*,¹⁴⁷ was presented with the issue of whether an insured's execution of a release of claims against the insurance company for its contractual obligations under one policy, also acts as a release of the insurance company for a bad faith tort action arising out of the claim handling. The court found that a release of the insurer's contractual obligation does not necessarily release the insurance company from an action for bad faith.¹⁴⁸

An insured corporation owned property that housed a convenience store, a gas station, and a towing/mechanic business, all of which were damaged by a fire.¹⁴⁹ Higdon, the sole shareholder of County Line Towing, made a claim for the fire loss on behalf of the convenience store, the gas station and the towing/mechanic business.¹⁵⁰ The convenience store and gasoline businesses

wear and tear, (b) deterioration or (c) mechanical or electrical breakdown or failure of equipment, components or accessories installed in the aircraft unless such physical damage be coincident with and from the same cause as other loss covered by this policy.

Id. at 1074.

143. *See id.* at 1073-74.

144. *See id.* at 1073.

145. *See id.* at 1076.

146. *See id.*

147. 714 N.E.2d 285 (Ind. Ct. App. 1999), *trans. denied*, No. 35A02-9811-CV-938, 2000 Ind. LEXIS 5 (Ind. Jan. 7, 2000).

148. *See id.* at 292.

149. *See id.* at 288.

150. *See id.*

were insured by a commercial property coverage policy, and the towing/mechanic business was covered by a garage policy.¹⁵¹

After the fire, Cincinnati Insurance adjusted the loss and paid under the commercial property coverage policy, but failed to pay under the garage policy.¹⁵² County Line also alleged that Cincinnati Insurance unnecessarily delayed settling the claims, thereby forcing County Line to settle at a lower figure, in order to meet operating expenses of the businesses or face certain bankruptcy.¹⁵³

As part of the settlement, Higdon signed a release of all claims and causes of action against Cincinnati Insurance.¹⁵⁴ When the corporation sought additional monetary compensation for Cincinnati Insurance's alleged bad faith, the insurance company filed a declaratory judgment complaint contending that it had no further obligations to County Line under either the commercial property policy or the garage policy.¹⁵⁵ County Line counterclaimed for bad faith, and Higdon, in his individual capacity, sought to intervene for the purpose of asserting his own claim for emotional distress arising out of the alleged bad faith.¹⁵⁶

On Cincinnati Insurance's motion for summary judgment, the trial court held that County Line's counterclaim was, indeed, barred under the terms of the release.¹⁵⁷ It further held that Higdon could not bring a counterclaim because he was not a party to the insurance contract.¹⁵⁸

On appeal, the court of appeals reversed the summary judgment by finding that the release did not bar the insured from bringing a claim for bad faith as a distinct cause of action from the underlying contractual claim.¹⁵⁹ The court further explained that a release obtained under one policy does not necessarily bar an action under a separate policy.¹⁶⁰ Thus, the insured was free to pursue its claims under the garage policy. On the other hand, the court affirmed the trial court's finding that Higdon, individually, did not have a right to maintain an action in contract or tort because he was not a party to the insurance contracts.¹⁶¹

D. Misrepresentation on Application for Insurance

During the 1997-98 survey period there were several cases that examined the effect of material misrepresentations by an insured in the acquisition of

151. *See id.*

152. *See id.*

153. *See id.*

154. *See id.*

155. *See id.* at 288-89.

156. *See id.* at 289.

157. *See id.*

158. *See id.*

159. *See id.* at 292.

160. *See id.*

161. *See id.* at 296.

insurance.¹⁶² In the current survey year, only one case addressed this topic. The *Foster v. Auto-Owners Insurance Co.*¹⁶³ decision reiterated the supreme court's decision in *Guzorek*:¹⁶⁴ a material misrepresentation on an insurance application makes the insurance contract voidable.¹⁶⁵

However, the *Foster* decision advances *Guzorek* one step further. In *Foster*, the applicant signed multiple applications for a number of properties which he sought to be insured.¹⁶⁶ All of the applications were denied, except for one which covered a certain parcel of property.¹⁶⁷ On the accepted application, the insured indicated that he sustained no prior fire losses, which was incorrect.¹⁶⁸

The insured sustained a fire at the covered location, and the insured's claims for the losses were denied by the insurer based upon the material misrepresentations made by the insured.¹⁶⁹ The insured sued the insurer who filed a motion for summary judgment to obtain rescission of the policy based upon the insured's material misrepresentation.¹⁷⁰ The insured argued in opposition to the summary judgment motion that the insurer was on constructive notice of the insured's previous losses based upon its receipt and denial of the other applications.¹⁷¹

The supreme court rejected this argument. Because the insured signed the application as containing accurate information, the court believed it would be unreasonable to expect an insurer to possess constructive notice from a few applications out of the hundreds of thousands received by the insurer.¹⁷²

This case expresses the requirement that an insurance company must be given accurate and truthful information to appreciate and assess the risk to be insured. It further demonstrates that insureds, who fail to supply accurate information, will not benefit by receiving coverage.

III. LIFE AND DISABILITY INSURANCE CASES

A. Alcohol Exclusion

In construing the applicability of an alcohol exclusion provision contained in an accidental death policy, the court in *American Family Life Assurance Co.*

162. See *Colonial Penn Ins. Co. v. Guzorek*, 690 N.E.2d 664 (Ind. 1997).
163. 703 N.E.2d 657, 659 (Ind. 1998).
164. See *Guzorek*, 690 N.E.2d at 672.
165. See *Foster*, 703 N.E.2d at 659 (citing *Guzorek*, 690 N.E.2d at 672).
166. See *id.* at 658.
167. See *id.*
168. See *id.* In fact, the insured had sustained three fire losses before submitting the application.
169. See *id.*
170. See *id.*
171. See *id.* at 660.
172. See *id.*

v. Russell,¹⁷³ liberally read the policy language to allow coverage. In June 1996, Charles Simmons was struck by a train while in his automobile.¹⁷⁴ When the police arrived at the scene of the accident, they noticed a strong odor of alcohol on Simmons' person.¹⁷⁵ Simmons was taken to the hospital where he was pronounced dead.¹⁷⁶ Simmons' blood alcohol content at the time of his death was .326.¹⁷⁷ The coroner ruled that the cause of Simmons' death was "blunt force trauma, head and chest," but the coroner also found that acute ethanol intoxication contributed to his death.¹⁷⁸ The death certificate indicated that the injury occurred when Simmons passed out on the railroad tracks and was hit by the train.¹⁷⁹

Simmons owned an accidental death insurance policy issued by American Family Life Assurance Company ("AFLAC").¹⁸⁰ However, the policy contained an alcohol exclusion, which precluded coverage for participating in any event, including driving a car, while intoxicated.¹⁸¹ Simmons' sister, Mary Russell, filed a claim to recover the accidental death benefits under the policy, but AFLAC refused coverage based upon the alcohol exclusion.¹⁸²

Russell then filed suit alleging breach of contract and sought punitive damages for AFLAC's denial of coverage.¹⁸³ AFLAC filed a motion for summary judgment relying on the alcohol exclusion as the reason it denied coverage and asserting that Russell was not entitled to punitive damages.¹⁸⁴ After hearing arguments, the trial court denied AFLAC's motion on whether coverage existed, and granted partial summary judgment in favor of Ms. Russell.¹⁸⁵ The trial court, however, granted AFLAC's motion as to the claim for bad faith seeking punitive damages, and both parties appealed.¹⁸⁶

The appellate court affirmed the trial court's decisions on both the breach of contract and the bad faith issues.¹⁸⁷ The court found that generally insurers are free to limit their liability in any way that does not violate public policy.¹⁸⁸ With that freedom, however, comes the responsibility of living with the strict

173. 700 N.E.2d 1174 (Ind. Ct. App. 1998), *trans. denied*, 714 N.E.2d 168 (Ind. 1999) (mem.).

174. *See id.* at 1175.

175. *See id.*

176. *See id.*

177. *See id.* at 1176.

178. *Id.*

179. *See id.* at 1175-76.

180. *See id.* at 1176.

181. *See id.*

182. *See id.*

183. *See id.*

184. *See id.*

185. *See id.*

186. *See id.*

187. *See id.* at 1175.

188. *See id.* at 1177.

application of the language the insurer chooses to draft into its insurance contracts.¹⁸⁹

The court found that the insurance policy in this case plainly stated that the insured had to be participating in an event while intoxicated in order to invoke the alcohol exclusion.¹⁹⁰ Because the undisputed evidence indicate that Simmons was passed out at the time of the accident, he was not "participating in" any event that would exclude coverage under the policy.¹⁹¹ While the court found that AFLAC had breached the contract as a matter of law by denying coverage, it also found that AFLAC did so in good faith.¹⁹² Thus, the court affirmed the trial court's summary judgment on punitive damages.¹⁹³

B. Exacerbation of Pre-Existing Condition

In *Union Security Life Insurance Co. v. Acton*,¹⁹⁴ the court of appeals examined whether an aggravation of a person's pre-existing medical condition constituted a disability that was excluded under a "pre-existing condition" provision of a policy.¹⁹⁵ In *Acton*, the insured was working as a nurse anesthetist when he was struck by an ambulance cart in the emergency room and suffered a back injury.¹⁹⁶ As a result of the accident he was placed on permanent disability.¹⁹⁷

Acton filed a claim to collect on his Union Security disability policies. After reviewing his medical history, Union Security denied Acton's claims by contending that his disability was the result of a pre-existing condition, which was excluded under the policy.¹⁹⁸

Acton filed suit against Union Security claiming that his disability was caused by an aggravation of his pre-existing condition.¹⁹⁹ The court of appeals agreed with Acton.²⁰⁰ The court analyzed the exclusionary clause and found that

189. *See id.*

190. *See id.*

191. *Id.* at 1177-78.

192. *See id.* at 1178.

193. *See id.*

194. 703 N.E.2d 662 (Ind. Ct. App. 1998), *trans. denied*, 714 N.E.2d 170 (Ind. 1999) (mem.).

195. *Id.* at 664.

196. *See id.* at 663.

197. *See id.*

198. The provision stated:

We do not cover disabilities resulting from: . . . (f) a pre-existing condition (a condition which required medical diagnosis or treatment within the 6 months immediately before the effective date and which causes a loss within the 6 months immediately after the effective date). Disability beginning 6 months after the effective date will not be considered pre-existing.

Id.

199. *See id.* at 664.

200. *See id.* at 664-65.

the disabling condition was not a result of the pre-existing medical condition, but occurred because of the accident which aggravated the medical condition into a disability.²⁰¹

CONCLUSION

Unquestionably, the most notable development in insurance law during this survey period is the *Wills* decision. While the long range effect of the *Wills* decision remains to be seen, the most likely by-product of the change will be an increase in bad faith litigation in Indiana caused by insureds not being happy that their attorney is essentially an employee of their insurance company.

Several other cases decided during the survey period also dealt with bad faith claims against insurance companies. No doubt, Indiana remains a strict four-corners state, even in the context of insurance contracts. However, when faced with bad faith claims, Indiana courts seem to be asking insurance companies to interpret their insurance contracts a bit more leniently. This translates into more bad faith claims surviving summary judgment. Judicial decisions forthcoming in the next few years will be critical in developing Indiana's response to the national trend toward increasing bad faith claims.

201. See *id.* at 664.

SURVEY OF RECENT DEVELOPMENTS IN INDIANA PRODUCT LIABILITY LAW

JOSEPH R. ALBERTS*

INTRODUCTION

The 1999 survey period¹ produced some interesting and informative decisions in cases involving Indiana product liability law.² Cases decided during the survey period answer some questions and raise many new ones with respect to Indiana product liability law.

This Article does not attempt to provide a survey of all cases applying Indiana product liability law decided during the survey period. Rather, it addresses selected cases that are representative of the seminal product liability issues that courts applying Indiana law have handled during the survey period.³ The Article also provides some background information about the Indiana Product Liability Act ("IPLA") where appropriate.

I. CASES INTERPRETING STATUTORY DEFINITIONS

All claims that users or consumers⁴ file in Indiana against manufacturers⁵ and

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1. The survey period for this Article is October 1, 1998 to September 30, 1999.

2. Although many commentators and courts use the term "products liability" when referring to actions alleging damages as a result of defective and/or unreasonably dangerous consumer products, the applicable Indiana statutes refer to the term "product liability" (no "s"). This survey will follow the lead of the Indiana General Assembly and will likewise employ the term "product liability."

3. Some product liability cases that the Article does not treat in-depth include: *Clark v. Takata Corp.*, 192 F.3d 750 (7th Cir. 1998) (applying Kansas law); *Comer v. American Electric Power*, 63 F. Supp.2d 927 (N.D. Ind. 1999) (fire damage to home resulting from voltage surge caused by "loose neutral" connection on transformer); *Menges v. Depuy Motech, Inc.*, 61 F. Supp.2d 817 (N.D. Ind. 1999) (applying Wisconsin law); *Paper Manufacturers Co. v. Rescuers, Inc.*, 60 F. Supp.2d 869 (N.D. Ind. 1999) (holding that summary judgment was precluded in a case involving a third party claim against company that manufactured ink used in packaging for bone-cement powder because of factual questions regarding the manufacturer's knowledge of the ink's potential to cause the harm suffered, the adequacy of its warning, and whether plaintiff suffered physical harm); and *Precision Screen Machine, Inc. v. Hixon*, 711 N.E.2d 68 (Ind. Ct. App. 1999) (propriety of damage award in workplace injury product liability claim).

4. For purposes of application of the IPLA, "consumer" means: "(1) a purchaser; (2) any individual who uses or consumes the product; (3) any other person who, while acting for or on behalf of the injured party, was in possession and control of the product in question; or (4) any bystander injured by the product who would reasonably be expected to be in the vicinity of the

sellers⁶ for physical harm⁷ caused by a product⁸ are statutory in nature. The IPLA governs all such claims "regardless of the substantive legal theory or theories upon which the action is brought."⁹ In 1995, the Indiana General Assembly enacted some rather sweeping revisions to the IPLA as part of what many have called "tort reform" legislation. Among the more significant changes include the incorporation of negligence principles into statutory claims pursuant to the IPLA in cases in which claimants base their theory of liability upon either defective design or inadequate warnings.¹⁰ Traditional "strict liability" remains only in cases in which the theory of liability is based upon a manufacturing defect.¹¹ The 1995 amendments also limited actions against sellers,¹² more specifically defined the circumstances under which a distributor or seller could be deemed a manufacturer,¹³ converted the traditional "state of the art" defense into a rebuttable presumption,¹⁴ and injected comparative fault principles into

product during its reasonably expected use." IND. CODE § 34-6-2-29 (1998). "User" has the same meaning as "consumer." *Id.* § 34-6-2-147.

5. For purposes of application of the IPLA, "manufacturer" means "a person or an entity who designs, assembles, fabricates, produces, constructs, or otherwise prepares a product or a component part of a product before the sale of the product to a user or consumer." *Id.* § 34-6-2-77. "Manufacturer" also includes a seller who "(1) has actual knowledge of a defect in a product; (2) creates and furnishes a manufacturer with specifications relevant to the alleged defect for producing the product or who otherwise exercises some significant control over all or a portion of the manufacturing process; (3) alters or modifies the product in any significant manner after the product comes into the seller's possession and before it is sold to the ultimate user or consumer; (4) is owned in whole or significant part by the manufacturer; or (5) owns in whole or significant part the name of the actual manufacturer." *Id.* § 34-6-2-77(a).

6. For purposes of application of the IPLA, "seller" means "a person engaged in the business of selling or leasing a product for resale, use, or consumption." *Id.* § 34-6-2-136.

7. For purposes of application of the IPLA, "physical harm" means "bodily injury, death, loss of services, and rights arising from any such injuries, as well as sudden, major damage to property." *Id.* § 34-6-2-105. It does not include "gradually evolving damage to property or economic losses from such damage." *Id.*

8. For purposes of application of the IPLA, "product" means "any item or good that is personalty at the time it is conveyed by the seller to another party." *Id.* § 34-6-2-114. The term does not apply to a "transaction that, by its nature, involves wholly or predominantly the sale of a service rather than a product." *Id.*

9. *Id.* § 34-20-1-1.

10. *See id.* § 34-20-2-2.

11. *See id.* The editors of Burns Indiana Statutes Annotated have included a title that could be misleading to their readers. The short title the editors have chosen for section 34-20-2-2 of the Indiana Code is "Strict Liability—Design Defect." The juxtaposition of the terms in that title might cause a reader to incorrectly assume that the statute provides for strict liability in design defect cases.

12. *See id.* § 34-20-2-3.

13. *See id.* § 34-20-2-4.

14. *Id.* § 34-20-5-1. The presumption is that the product causing the physical harm is not

product liability cases.¹⁵

As such, cases interpreting the IPLA are of the utmost importance. The cases that follow are a sampling of those decided during the survey period that define and interpret IPLA terms.

A. User or Consumer

In *Estate of Shebel v. Yaskawa Electric America, Inc.*,¹⁶ the Indiana Supreme Court addressed the issue of who qualifies as a "user or consumer" for purposes of applying the ten-year product liability statute of repose. The court ultimately held that a "user or consumer" under the IPLA includes a distributor who uses the product extensively for demonstration purposes and that the ten year statute of limitations begins with delivery for such a use.¹⁷

defective and that the product's manufacturer is not negligent. The IPLA entitles a manufacturer or seller to such a presumption if,

before the sale by the manufacturer, the product: (1) was in conformity with the generally recognized state of the art applicable to the safety of the product at the time the product was designed, manufactured, packaged, and labeled; and (2) complied with applicable codes, standards, regulations, or specifications established, adopted, promulgated, or approved by the United States or by Indiana, or by any agency of the United States or Indiana.

Id.

15. The 1995 amendments changed Indiana law with respect to fault allocation and distribution in product liability cases. The Indiana General Assembly made it clear that a defendant cannot be liable for more than the amount of fault directly attributable to that defendant, as determined pursuant to section 34-20-8-1 of the Indiana Code, nor can a defendant be held jointly liable for damages attributable to the fault of another defendant. *See id.* § 34-20-7-1.

The 1995 amendments now require the trier of fact to compare the fault of the person suffering the physical harm, as well as the fault of all others who caused or contributed to the cause of harm. *See id.* § 34-20-8-1(a). The statute requires that the trier of fact compare such fault "in accordance with IC 34-57-2-7, IC 34-57-2-8, or IC 34-57-2-9." *Id.* Those references appear to be incorrect cross-references. Chapter 51 of Title 34 contains Indiana's Comparative Fault Act. Sections 34-51-2-7 through -9 of the Indiana Code are, therefore, most likely the statutory provisions to which the statute intends to refer. The IPLA mandates that "[i]n assessing percentage of fault, the jury shall consider the fault of all persons who contributed to the physical harm, regardless of whether the person was or could have been named as a party, as long as the nonparty was alleged to have caused or contributed to cause the physical harm." *Id.* § 34-20-8-1(b).

Practitioners also should recognize that the definition of "fault" for purposes of the IPLA is not the same as the definition of "fault" applicable in actions governed by the Comparative Fault Act. *Cf. id.* § 34-6-2-45(a); *id.* § 34-6-2-45(b). For purposes of the IPLA, the definition of "fault" does not include the "unreasonable assumption of risk not constituting an enforceable express consent, incurred risk, and unreasonable failure to avoid an injury or to mitigate damages," *id.*, which is included in the Comparative Fault Act's definition of fault. *See id.*

16. 713 N.E.2d 275 (Ind. 1999).

17. *Id.* at 276.

In 1992, a piece of a computer-controlled lathe struck Shebel in the chest, killing him.¹⁸ Shebel's estate filed a product liability action against the lathe manufacturer and an American affiliate of the company that manufactured the lathe's computer controller. The lathe involved in the case has an interesting history. Its manufacturer sold it to a trading company in Japan, which, in turn, sold the lathe to Yamazen, USA, Inc., its American subsidiary. Yamazen received the lathe on March 5, 1981.¹⁹ Yamazen used the lathe at trade shows to make manufactured parts. In 1982, Yamazen sold the lathe to a company that used it as a "demo machine" for about a year before returning it to Yamazen.²⁰ Yamazen then sold the lathe to Aegis Sales and Engineering, Inc., which received it in January 1983. Shebel's employer ultimately purchased the lathe from the company that purchased it from Aegis in 1990.²¹

The trial court held that, as a matter of law, Yamazen was a "user or consumer" of the lathe, and that the uncontroverted facts established that Shebel's injury occurred more than ten years after the lathe was delivered to Yamazen.²² Accordingly, the trial court entered summary judgment for both defendants based upon the statute of repose. The court of appeals reversed the trial court, holding that, as a matter of law, Yamazen was a "seller" and not a "user or consumer."²³ The Indiana Supreme Court granted transfer and affirmed the trial court's decision.²⁴

The supreme court recognized the threshold question as whether Yamazen, which received the lathe in March 1981, was a "user or consumer."²⁵ After citing the product liability statute of repose and its applicable ten-year limit, the court explained the utility and underlying policy justifications for the existence of a statute of repose in product liability cases. Ultimately, the court reaffirmed the principle that the wisdom of the policy underlying a product liability statute of repose is for the legislature.²⁶

The *Shebel* court next recognized that the starting point for the ten-year product liability statute of repose is the "delivery to the initial user or consumer"²⁷ and thereafter quoted the statutory definition of "user or consumer."²⁸ After doing so, the court followed prior Indiana cases in

18. *See id.* at 277.

19. *See id.*

20. *Id.*

21. *See id.*

22. *Id.*

23. *Id.*

24. *See id.*

25. *Id.* at 278.

26. *See Estate of Shebel*, 713 N.E.2d at 278 (citing *Dague v. Piper Aircraft Corp.*, 418 N.E.2d 207, 212 (Ind. 1981)).

27. *Id.*

28. Section 33-1-1.5-2 of the Indiana Code defined "user or consumer" as "a purchaser, any individual who users or consumes the product, or any other person who, while acting for or on behalf of the injured party, was in possession and control of the product in question, or any

concluding that "user or consumer" does not include one who merely "acquires and resells,"²⁹ and that whether a particular person or entity is a "user or consumer" is "a purely legal question."³⁰

The court disagreed with the estate's contention that Yamazen could not be a "user or consumer" because it was a seller.³¹ Although the court recognized that Yamazen sold lathes and was "generally a distributor,"³² it also determined that Yamazen was a user or consumer of the *particular lathe* at issue.³³ While isolated or incidental use may not be sufficient to render a distributor a user, the undisputed facts before it convinced the court that Yamazen had "repeated and extensive use of the lathe."³⁴ The designated facts demonstrated that Yamazen used the lathe to manufacture parts at trade shows, which the court concluded was not a case of possession only for resale or for assembling its component parts.³⁵ The court also noted that Yamazen used the lathe for its intended end use--the production of machined parts.³⁶ Accordingly, the court concluded that Yamazen was, as a matter of law, the "initial user or consumer" of the lathe.³⁷

Because Yamazen was the "initial user or consumer" of the lathe and because Yamazen received the lathe as the initial user or consumer in March 1981, the

bystander injured by the product who would reasonably be expected to be in the vicinity of the product during its reasonably expected use."

29. *Estate of Shebel*, 713 N.E.2d at 278 (citing *Thiele v. Faygo Beverage, Inc.*, 489 N.E.2d 562 (Ind. Ct. App. 1986); *Whittaker v. Federal Cartridge Corp.*, 466 N.E.2d 480 (Ind. Ct. App. 1984)).

30. *Id.* (citing *Estate of Shebel v. Yaskawa Elec. Am., Inc.*, 676 N.E.2d 1091, 1092 (Ind. Ct. App. 1997), *rev'd*, 713 N.E.2d at 275 (Ind. 1999); *State ex rel. Paynter v. Marion County Super. Ct.*, 344 N.E.2d 846, 849 (1976)).

31. *Id.* at 279.

32. *Id.*

33. *See id.*

34. *Id.* Evidence revealed that before being sold to Aegis, the lathe "had been run in 'hundreds at least and possibly in the thousands' of hours." *Id.*

35. *See id.*

36. *See id.*

37. *Id.* In reaching its decision about whether Yamazen was a "user or consumer," the court also addressed the estate's attempts to utilize testimony of an expert witness in an attempt to create a fact issue sufficient to defeat the defendants' motions for summary judgment. *See id.* at 280. The witness opined that Aegis, not Yamazen, was the first user or consumer of the lathe. *See id.* The witness also pointed out that Aegis accepted the lathe on January 12, 1983, that the machine had not previously been used to manufacture parts used in any manufacturing process or commerce before delivery to Aegis, that Aegis received a new warranty, and that some documentation identified the lathe as a 1983 (not a 1980) model. *See id.* The court determined that the expert's opinion about who was the first user or consumer amounted to an inadmissible legal conclusion pursuant to Rule 704(b) of the Indiana Rules of Evidence, and that the other points raised were irrelevant. *See id.* According to the court, the critical question is whether the machine was "used," not what happened to the products it made or whether a seller was willing to issue a warranty for a product as a "new" model. *Id.* at 280.

1992 accident involving Shebel took place more than ten years after delivery to Yamazen.³⁸ Thus, the court held that the product liability statute of repose barred the Estate's claims.³⁹

In *Butler v. City of Peru*,⁴⁰ the court of appeals held that a maintenance worker was not a "consumer" of electricity such that his estate could assert a viable claim.⁴¹ James Butler was a maintenance worker for the Peru Community School Corporation. He was killed when he came into contact with a high voltage electrical line while attempting to repair an electrical problem at the baseball field at Peru High School.⁴² Butler's estate sued the City of Peru and Peru Municipal Utilities. The trial court granted summary judgment to both defendants and the estate appealed on several grounds,⁴³ the first of which was whether the IPLA applied.

On appeal, the *Butler* court rather narrowly phrased the product liability issue as whether the IPLA applies when an electrical utility customer's employee is injured on the customer's premises by a defect in an electrical installation the utility did not perform.⁴⁴ The trial court determined that the IPLA does not apply because James Butler was not a "consumer" of electricity. The court of appeals agreed.

In doing so, the *Butler* court was quick to point out that electricity can be a "product" within the meaning of the IPLA,⁴⁵ and that determining whether a plaintiff is a "consumer" within the meaning of the IPLA is a "pure question of law."⁴⁶ According to the *Butler* court,

of all of the potential plaintiffs who might be injured by a defective product, those that have been granted the protection of the [IPLA,] has been doubly limited to (1) users and consumers (2) whom the seller should reasonably foresee as being subject to the harm caused by the product's defective condition.⁴⁷

38. *See id.*

39. *See id.*

40. 714 N.E.2d 264 (Ind. Ct. App. 1999), *trans. granted*, 52A02-9803-CV-269, 2000 Ind. LEXIS 175 (Ind. Feb. 17, 2000).

41. *Id.* at 272.

42. *See id.* at 265.

43. The other issues involved whether the utility company had a duty to insulate the high voltage line at issue, whether it had a duty to protect a customer's employee from a dangerous condition in the electrical work located on the customer's property, whether it gratuitously assumed a duty to protect persons from dangerous conditions, and, finally, whether James Butler was contributorily negligent as a matter of law. *See id.* at 265-66.

44. *See id.* at 265.

45. *Id.* at 267 (citing *Public Serv. of Ind., Inc. v. Nichols*, 494 N.E.2d 349 (Ind. Ct. App. 1986)).

46. *Id.* (citing *Thiele v. Faygo Beverage, Inc.*, 489 N.E.2d 562 (Ind. Ct. App. 1986)).

47. *Id.*

The *Butler* court next analyzed section 34-6-2-29 of the Indiana Code.⁴⁸ The court reasoned that James Butler was not a purchaser of the product, that he did not consume the product, that he did not possess it while acting on behalf of an injured party, and that he was not a bystander.⁴⁹ Thus, the court determined that the only definition of consumer that conceivably could apply to James is "any individual who . . . uses the product."⁵⁰

Citing *Thiele v. Faygo Beverage, Inc.*,⁵¹ the *Butler* court reiterated that the legislature intended "user or consumer" "to characterize those who might foreseeably be harmed by a product *at or after* the point of its retail sale or equivalent transaction with a member of the consuming public."⁵² In light of *Thiele*, the court alternately determined that James Butler was not a "user" of the electricity product, and that the trial court did not err in determining that the IPLA does not apply.⁵³

B. Products or Services

In *Marsh v. Dixon*,⁵⁴ the court of appeals addressed whether an amusement ride is a product or a service for purposes of the IPLA. In *Marsh*, plaintiff Jason Marsh injured his ankle when he fell from a wind tunnel ride that simulated the experience of free fall. The ride projected columns of air to levitate a trampoline upon which patrons rode.⁵⁵

Marsh and his wife sued Kirk Dixon, the individual who constructed the ride, and his company, Dyna Soar Aerobatics, Inc. (collectively, "Dyna Soar"). The Marshes asserted both negligence and product liability claims.⁵⁶ The trial court entered summary judgment in favor of Dyna Soar. On appeal, the Marshes raised two issues for review. The first issue involved the trial court's application of an exculpatory clause to bar the Marshes' negligence claims.⁵⁷ The second issue focused upon the propriety of the trial court's grant of summary judgment with respect to the Marshes' product liability claim.⁵⁸ The court of appeals reversed

48. See *supra* note 4 (providing the definition of "consumer" for IPLA application); see also IND. CODE § 34-6-2-29 (West 1998).

49. See *Butler*, 714 N.E.2d at 268.

50. *Id.*

51. *Thiele*, 489 N.E.2d at 562.

52. *Butler*, 714 N.E.2d at 268 (citing *Thiele*, 489 N.E.2d at 586).

53. *Id.*

54. 707 N.E.2d 998 (Ind. Ct. App.), *trans. denied*, 726 N.E.2d 302 (Ind. 1999).

55. See *id.* at 999.

56. The Marshes' cause of action accrued when Jason Marsh was injured on October 9, 1994. Because their cause of action accrued before June 30, 1995, the 1995 amendments to the IPLA that incorporate negligence into Indiana's statutory cause of action for physical harm caused by defective products did not apply. Thus, pursuit of both a common law "negligence" claim and a statute-based "products" claim was then appropriate.

57. See *id.* at 1000.

58. See *id.* at 1001.

the trial court's decision to apply the exculpatory clause⁵⁹ and affirmed its decision to grant summary judgment on the product liability claim.

The court of appeals, reviewing the trial court's grant of summary judgment on the product liability claim, first recognized that Dyna Soar had to be deemed a "seller of a product" to be subject to liability under the IPLA.⁶⁰ The version of the IPLA at issue defined "seller" as "a person engaged in the business of selling or leasing a product for resale, use, or consumption."⁶¹ The IPLA defines product as "any item or good that is personalty at the time it is conveyed by the seller to another party. It does not apply to a transaction that, by its nature, involves wholly or predominantly the sale of a service rather than a product."⁶²

The Marshes argued that Dixon both created a product (the machine) *and* provided a service (the wind tunnel ride).⁶³ They further argued that their claim should not be barred merely because a service also was provided. The court of appeals disagreed, reasoning that

[T]he transaction between Marsh and Dyna Soar wholly involved a service. By purchasing a ticket from Dyna Soar, Marsh received the limited right to ride the Dyna Soar machine. He did not receive an interest in any property. In fact, Dyna Soar retained all rights to operate and control the machine in question.⁶⁴

Accordingly, the *Marsh* court concluded that the trial court did not err when it entered summary judgment against the Marshes with respect to their product liability claim.⁶⁵

In *Lenhardt Tool & Die Co. v. Lumpe*,⁶⁶ the court of appeals also examined the IPLA's requirement that valid product liability actions must involve the sale of products as opposed to the provision of services. Lumpe worked as a "melter"

59. The *Marsh* court agreed with the Marshes that the release Jason signed exculpating Dyna Soar was not sufficient to release Dyna Soar for its own negligence. See *id.* at 1000-01.

60. *Id.*

61. *Id.* at 1001-02. The statute then applicable was section 33-1-1.5-2(5) of the Indiana Code, which is now recodified as section 34-6-2-136 of the Indiana Code.

62. *Marsh*, 707 N.E.2d at 1002. The statute then applicable was section 33-1-1.5-2(6) of the Indiana Code, which is now recodified as section 34-6-2-114 of the Indiana Code.

63. See *Marsh*, 707 N.E.2d at 1002.

64. *Id.* In so doing, the court of appeals found *Hill v. Rueth-Riley Construction Co.*, 670 N.E.2d 940 (Ind. Ct. App. 1996), persuasive. In *Hill*, the defendants removed and reset guardrails to facilitate the resurfacing of U.S. Highway 31. The plaintiff struck one of the guardrails and brought suit against the defendants pursuant to the IPLA. See *id.* at 942. The court held that the contract between the Indiana Department of Transportation and the plaintiffs was predominantly a contract for services "[e]ven if it were true that 31 new concrete plugs were installed and some rusted rails replaced, the [plaintiffs] have presented no evidence that this contract was not 'for the most part' about the service of resurfacing the roadway." *Marsh*, 707 N.E.2d at 1002 (quoting *Hill*, 670 N.E.2d at 943).

65. See *Marsh*, 707 N.E.2d at 1002.

66. 703 N.E.2d 1079 (Ind. Ct. App. 1999), *trans. denied*, 722 N.E.2d 824 (Ind. 2000).

and a "pin man" for Olin Brass, a company that manufactures brass bars.⁶⁷ Part of the manufacturing process involves pouring molten metal into a mold. On August 22, 1992, Olin was injured in an explosion at Olin.⁶⁸ According to the court, Lenhardt manufactured some of the molds used by Olin at the time of the explosion.⁶⁹

Lumpe filed a claim against Lenhardt, alleging negligence and strict liability.⁷⁰ Because no one could identify or locate the molds and plugs used at the time of the accident, Lenhardt filed a motion for summary judgment with the trial court on the theory that Lumpe could not prove that Lenhardt either negligently manufactured the molds at issue or manufactured the molds in such a manner as to be dangerously defective.⁷¹ The trial court denied Lenhardt's motion and Lenhardt appealed.⁷²

After concluding that the trial court did not commit reversible error in applying Indiana's summary judgment standard with respect to Lumpe's negligence claim,⁷³ the *Lenhardt* court turned its attention to the merits of Lenhardt's motion for summary judgment concerning Lumpe's strict liability claim.⁷⁴ Lenhardt argued that the IPLA did not apply because it provides services, not products, and because it is not a "seller."⁷⁵

The court first recognized that the IPLA does not apply to transactions that involve "wholly or predominantly the sale of a service rather than a product."⁷⁶ However, after an analysis of three cases, *Denu v. Western Gear Corp.*,⁷⁷ *Whitaker v. T.J. Snow Co.*,⁷⁸ and *Rotation Products Corp. v. Department of State Revenue*,⁷⁹ the court determined that any entity is a manufacturer and provider of products under the IPLA if it reconditions, alters, or modifies a product or raw material to the extent that a new product has been introduced into the stream of commerce.⁸⁰ The court also determined that when a product exists before the work performed, the extent of the repair or work performed on the product

67. *Id.* at 1081.

68. *See id.*

69. *See id.*

70. *See id.*

71. *See id.*

72. *See id.*

73. In doing so, the *Lenhardt* case may have created something of a procedural showdown in the summary judgment context. *See infra* notes 169-205 and accompanying text.

74. Lumpe's cause of action on August 22, 1992, is, of course, before the July 1, 1995 accrual date necessary for application of the 1995 amendments to the IPLA. Accordingly, Lumpe was able to bring both statutory strict liability claims and separate negligence claims regardless of whether the theory was manufacturing, design, or warning defect.

75. *See Lenhardt Tool & Die Co.*, 703 N.E.2d at 1084.

76. *Id.* at 1085 (citing IND. CODE § 33-1-1.5-2(6) (1998)).

77. 581 F. Supp. 7, 8 (S.D. Ind. 1983).

78. 953 F. Supp. 1034, 1039-45 (S.D. Ind. 1997), *aff'd*, 151 F.3d 661 (7th Cir. 1998).

79. 690 N.E.2d 795, 801 (Ind. Tax Ct. 1998).

80. *See Lenhardt Tool & Die Co.*, 703 N.E.2d at 1085.

determines whether an entity has created a new product or merely serviced an existing product.⁸¹

The *Lenhardt* court pointed out that Olin shipped solid blocks of metal to Lenhardt with drawings and specifications. Lenhardt then machined the block of metal into molds per the designs found in the drawings and specifications. As such, the court concluded that Lenhardt transformed the metal block into a new product that was substantially different from the raw material used and, therefore, it has provided products, not merely services.⁸² Moreover, the court concluded that the repair of damaged molds could be viewed as either the creation of a new product or the service of repairing the original product, depending upon the degree of work needed.⁸³

Finally, because the court determined that Lenhardt created new products when it made the molds, and possibly when it repaired the molds, the court concluded that Lenhardt was a manufacturer of molds.⁸⁴ As such, Lenhardt was, by definition, a "seller" for purposes of the application of the IPLA.⁸⁵

C. Physical Harm

*Miceli v. Ansell, Inc.*⁸⁶ is case in which a husband and a wife sued a condom manufacturer after the wife became pregnant. The plaintiffs contended that the pregnancy resulted from a hole in the condom.⁸⁷ They filed claims against the condom manufacturer based upon strict liability, negligent design, manufacture, packaging, and quality control, and breach of warranty of merchantability and fitness for a particular purpose.⁸⁸

The condom manufacturer filed a motion to dismiss, arguing that the complaint failed to "allege any 'physical harm' to Plaintiffs and because the condom, even if defective, was not unreasonably dangerous."⁸⁹ In its written opinion denying the motion, the court addressed both arguments.

With respect to the "strict liability" claim,⁹⁰ the court recognized that

81. *See id.*

82. *See id.*

83. *See id.* at 1085-86.

84. *See id.* at 1086.

85. *Id.*

86. 23 F. Supp.2d 929 (N.D. Ind. 1998).

87. *See id.* at 930.

88. *See id.* at 931.

89. *Id.* at 932.

90. Plaintiffs allegedly purchased and used the condom at issue on May 11, 1997, which means that the plaintiffs' cause of action "accrued" after June 30, 1995. As such, the post-1995 amendments to the IPLA should apply. Section 34-20-2-1 of the Indiana Code makes a "strict liability" claim available only for manufacturing defects because

in an action based on an alleged design defect in the product or based on an alleged failure to provide adequate warnings or instructions regarding the use of the product, the party making the claim must establish that the manufacturer or seller failed to

“physical harm,” according to section 34-6-2-105 of the Indiana Code, means “bodily injury, death, loss of services, and rights arising from any such injuries, as well as sudden, major damage to property.”⁹¹ In an effort to determine whether pregnancy constitutes a “physical harm” as defined by the IPLA, the court examined Indiana state court opinions. In doing so, the court cited both *Garrison v. Foy*⁹² and *Cowe v. Forum Group, Inc.*,⁹³ for the proposition that Indiana courts, in other contexts, recognize “wrongful pregnancy” claims.⁹⁴ Thus, the court concluded that “[b]y recognizing the claim of wrongful pregnancy, Indiana state courts have decided that in certain cases, pregnancy may be considered a harm or damage done to a plaintiff.”⁹⁵ More specifically, the court found that “pregnancy may constitute a ‘harm’ where efforts to prevent conception fail as the result of the defendant, whether he be a doctor, a pharmacist, or a contraceptive device manufacturer.”⁹⁶

The manufacturer also argued that the condom, even if defective, was not unreasonably dangerous because the sole proximate cause of pregnancy is the union of the sperm and egg.⁹⁷ The court disagreed, first pointing out that Indiana courts recognize claims for wrongful pregnancy in cases where plaintiffs allege that the doctor’s or pharmacist’s negligence proximately caused a pregnancy by failing to prevent the union of sperm and egg.⁹⁸ Accordingly, the court refused to find the claims foreclosed as a matter of law in the context of a motion to dismiss.⁹⁹ Whether the condom was, in fact, unreasonably dangerous and/or the proximate cause of the pregnancy are questions to be considered on the merits “if and when the parties file motions for summary judgment.”¹⁰⁰

II. DEFENSES AND COMPARATIVE FAULT ISSUES

The IPLA includes specifically enumerated defenses to product liability actions in Indiana.¹⁰¹ Practitioners know these defenses as the incurred risk

exercise reasonable care under the circumstances in designing the product or in providing the warnings or instructions.

IND. CODE § 34-20-2-1 (West 1998). The court’s opinion does not recognize that distinction, although the “elements” necessary to prove a “strict liability” manufacturing defect claim appear to be appropriate. *Miceli*, 23 F. Supp.2d at 932.

91. *Miceli*, 23 F. Supp.2d at 932.

92. 486 N.E.2d 5 (Ind. Ct. App. 1985).

93. 575 N.E.2d 630 (Ind. 1991).

94. *Miceli*, 23 F. Supp.2d at 932 (citations omitted).

95. *Id.* at 933.

96. *Id.*

97. *See id.*

98. *See id.* at 934.

99. *See id.*

100. *Id.*

101. *See* IND. CODE § 34-20-6-1 (1998).

defense,¹⁰² the misuse defense,¹⁰³ and the modification or alteration defense.¹⁰⁴ A handful of cases decided during the survey period help to illustrate how Indiana courts apply and interpret these defenses.

In *Hopper v. Carey*,¹⁰⁵ Bernard Hopper and his son were injured when the fire truck in which they were riding was involved in an accident with another truck. The fire truck was equipped with seat belts, but none of the occupants were wearing them at the time of the accident.¹⁰⁶ The Hoppers'¹⁰⁷ complaint alleged negligence against Carey, a contractor who performed paving work on the road's shoulder, and the county highway department. The Hoppers also asserted a strict liability claim against the manufacturer of the fire truck, S & S Fire Apparatus Co.¹⁰⁸

One of the defendants filed a motion in limine seeking an order that evidence of the Hoppers' failure to wear seat belts was admissible to demonstrate their fault. The trial court granted the motion in limine and certified the order for interlocutory appeal.¹⁰⁹

The court of appeals separately addressed the issue of the Hoppers' "fault" for failure to wear seat belts, first analyzing claims under the Comparative Fault Act,¹¹⁰ then claims against the highway department governed by contributory negligence,¹¹¹ and, finally, product liability claims against S & S.¹¹²

102. "It is a defense to an action under [the IPLA] that the user or consumer bringing the action: (1) knew of the defect; (2) was aware of the danger in the product; and (3) nevertheless proceeded to make use of the product and was injured." *Id.* § 34-20-6-3.

103. "It is a defense to an action under [the IPLA] that a cause of the physical harm is a misuse of the product by the claimant or any other person not reasonably expected by the seller at the time the seller sold or otherwise conveyed the product to another party." *Id.* § 34-20-6-4.

104. Indiana Code section 34-20-6-5 states:

It is a defense to an action under [the IPLA] that a cause of the physical harm is a modification or alteration of the product made by any person after the product's delivery to the initial user or consumer if the modification or alteration is the proximate cause of physical harm where the modification or alteration is not reasonably expectable to the seller.

Id. § 34-20-6-5.

105. 716 N.E.2d 566 (Ind. Ct. App. 1999), *trans. denied*, No. 72A01-9809-CV-330, 2000 Ind. LEXIS 270 (Ind. Mar. 23, 2000).

106. *See id.* at 569.

107. Bernard and Rettie Hopper brought claims individually and on behalf of their minor son, George. *See id.*

108. *See id.*

109. *See id.* at 569-70.

110. *Id.* at 573.

111. Common law principles of contributory negligence governed the Hoppers' negligence claims against the highway department. *See id.* at 573-75. Indiana's Comparative Fault Act governed the Hoppers' negligence claims against Carey. *See id.* at 570, 575-76. The court of appeals ultimately determined that the "seatbelt defense" is unavailable to all three defendants in a negligence context regardless of whether the claims are governed by the Comparative Fault Act

With respect to the product liability claims against S & S, the *Hopper* court began by recognizing that IPLA claims are subject to specifically enumerated defenses, including the "incurred risk" defense embodied in section 34-20-6-3 of the Indiana Code.¹¹³ The *Hopper* court also pointed out that "even if a product is sold in a defective condition unreasonably dangerous, recovery will be denied an injured plaintiff who had actual knowledge and appreciation of the specific danger and voluntarily accepted [incurred] the risk."¹¹⁴

Because the Hoppers did not adequately specify the basis of their claim, the court was unclear whether the defect in the fire truck was open and obvious or whether warnings were placed on the truck informing the passengers of the specific risk from which the Hoppers' injuries resulted.¹¹⁵ Without such information, the court wrote that it was unable to determine the applicability of the incurred risk defense.¹¹⁶ The *Hopper* court went on, however, to note in potentially important dicta that evidence of seat belt usage is only admissible when a plaintiff has actual knowledge of a specific risk against which he fails to protect himself.¹¹⁷ In other potentially important dicta, the *Hopper* court added:

[I]f Hopper is complaining of the absence of a structure designed for the safety of passengers in the event of a roll-over, evidence that seatbelts were adequate safety devices in the absence of such a structure would be valid evidence to negate Hopper's claim of causation. . . . In short, the lack of a safety device cannot be the cause of the injuries if other adequate but unused safety devices were available to the plaintiff.¹¹⁸

Because the record did not disclose the Hoppers' specific grounds for a product liability action, the court of appeals remanded to the trial court for further findings.¹¹⁹

In another interesting case, *Cole v. Lantis Corp.*,¹²⁰ Cole's job required him to load cargo into aircraft. He worked several feet off the ground atop an elevated platform known as a "K-Loader."¹²¹ When positioned for loading, there was a gap of approximately eighteen inches between the edge of the K-Loader's platform and the edge of the aircraft cargo bay. The gap was necessary to prevent the K-Loader from damaging an aircraft's fuselage.

Cole sustained serious injuries when he slipped through the gap and fell approximately fifteen feet to the ground. He filed suit against Lantis, the

or common law contributory fault principles. *Id.* at 576.

112. *See id.*

113. *Id.*

114. *Id.* (quoting *Koske v. Townsend Eng'g Co.*, 551 N.E.2d 437, 441 (Ind. 1990)).

115. *See id.*

116. *See id.*

117. *See id.*

118. *Id.* (citations omitted).

119. *See id.*

120. 714 N.E.2d 194 (Ind. Ct. App. 1999).

121. *Id.* at 197.

manufacturer of the K-Loader.¹²² Lantis filed a motion for summary judgment. Cole opposed the motion by presenting the affidavit of a safety engineer who opined that the K-Loader was negligently designed and unreasonably dangerous due to several defects.¹²³ In addition, Cole had used other Lantis K-Loaders that utilized wider platforms and had rails and platforms along the left and right sides. Cole also testified that the K-Loader from which he fell was not as safe as other K-Loaders because "there wasn't much of a rail or a platform to stand onto."¹²⁴

Additional facts disclosed that Cole had observed the gap and appreciated the danger posed by it since his first day on the job.¹²⁵ He expressed concern regarding the danger to his supervisors, but no action was taken to alleviate the danger. Before the fall, Cole had worked without incident on the type of K-Loader at issue for more than a year.¹²⁶

The trial court granted summary judgment to Lantis. On appeal, Lantis continued to argue that Cole was fully aware of the dangers posed by the gap and that the product was not unreasonably dangerous under the open and obvious rule.¹²⁷ Lantis also argued that because Cole had actual knowledge, understanding, and appreciation of the specific risk posed by the gap, the affirmative defense of incurred risk barred his claim.¹²⁸ The court of appeals disagreed, and reversed the trial court's grant of summary judgment.¹²⁹

The court of appeals first determined that application of the open and obvious danger rule was a matter for the jury.¹³⁰ In doing so, however, the court recognized that, technically, Indiana courts have not traditionally applied the open and obvious "defense" to claims brought pursuant to the IPLA.¹³¹ As the court explained, a defective condition must be hidden or concealed to be

122. *See id.*

123. *See id.* The claimed defects were:

1) that the gap was too wide; 2) that the handrail was inadequate; 3) that there was insufficient work space on the platform; 4) that the instructions in the operating manual were inadequate; and 5) that there was no warning regarding the requirement that a bumper be near the aircraft to provide adequate protection against falling.

Id.

124. *Id.*

125. *See id.* at 198.

126. *See id.*

127. *See id.*

128. *See id.*

129. *See id.* at 200.

130. *See id.*

131. *Id.* (citing *FMC Corp. v. Brown*, 551 N.E.2d 444, 446 (Ind. 1988)). Indeed, the *Cole* court cites *FMC* for the proposition that "the open and obvious rule does not apply to strict liability claims under the Indiana Product Liability Act." *Cole*, 714 N.E.2d at 199 (citation omitted). *FMC* was, of course, decided before the 1995 amendments that grounded all product liability actions in the IPLA. When *FMC* was decided, claimants could assert both a valid common law negligence claim and a valid statutory "strict liability" claim. In light of the 1995 amendments, the IPLA no longer includes *only* strict liability claims. *See* IND. CODE § 34-20-2-2 (1998).

unreasonably dangerous. "Thus, whether a danger is open and obvious and whether the danger is hidden are two sides of the same coin."¹³² Accordingly, the court recognized that evidence of the open and obvious nature of the danger, rather than being technically a defense, in reality "serves to negate a necessary element of the plaintiff's prima facie case that the defect was hidden."¹³³ As such, a majority of the appellate panel in *Cole* concluded that whether the K-Loader is unreasonably dangerous (or whether the open and obvious rule bars Cole's claim) is a question of fact that the jury must resolve.¹³⁴

With respect to the incurred risk argument, the court was quick to point out that incurred risk is a defense to both strict liability and negligence claims and that it "involves a mental state of venturousness on the part of the actor and demands a subjective analysis into the actor's actual knowledge and voluntary acceptance of the risk."¹³⁵ In the summary judgment context, application of the incurred risk defense requires evidence without conflict from which the sole inference to be drawn is that the plaintiff had actual knowledge of the specific risk and understood and appreciated that risk.¹³⁶

The majority in *Cole* cited Indiana decisions recognizing that the responsibilities and influences arising from workplace involvement can determine the voluntariness of an employee's actions.¹³⁷ Because Cole's job necessarily entailed moving containers across the gap and his apparent belief that he must somehow find a way to work around the known danger, the majority concluded that whether Cole voluntarily incurred the risk of falling through the gap is also a fact question for the jury's resolution.¹³⁸

Judge Friedlander's dissenting opinion concludes that Lantis is entitled to summary judgment in light of the doctrine of incurred risk.¹³⁹ This dissent recognizes that the defense of incurred risk applies when the evidence establishes that the plaintiff knew and appreciated the danger caused by the alleged negligence, but nevertheless accepted the danger voluntarily.¹⁴⁰ With respect to the cases the majority cited concerning the role an employee's workplace plays

132. *Cole*, 714 N.E.2d at 199 (citations omitted).

133. *Id.* (citations omitted).

134. *See id.* at 200. Among the facts sufficient to convince a majority of the appellate panel of the existence of a jury question were that Cole had safely moved containers over the gap for more than a year before the accident, that Cole had done so by stepping over it, and that there were no obvious or reasonable precautionary measures that Cole could have taken to reduce the risk of falling. *See id.* at 199.

135. *Id.* at 200 (citing *Schooley v. Ingersoll Rand, Inc.*, 631 N.E.2d 932, 940 (Ind. Ct. App. 1994)).

136. *See id.*

137. *See id.*

138. *See id.*

139. *See id.* at 200-01 (Friedlander, J., dissenting).

140. *See id.* at 201. Judge Friedlander's dissent also appropriately recognizes that the defense of incurred risk applies to negligence claims brought under the IPLA. *See id.* That passage reveals an implicit understanding that the IPLA now governs certain negligence claims.

in the "voluntariness" of an employee's actions,¹⁴¹ Judge Friedlander pointed out that the "influence" with which Indiana courts have been concerned stems from the employer/defendant and the "inducement" arising from the continuance of a business relationship or employment.¹⁴² In Cole's case, Judge Friedlander wrote that Lantis did not have a business relationship with Cole and was, therefore, unable to exert any influence over Cole with regard to the risk posed by using the K-Loader.¹⁴³

Judge Friedlander viewed the case as being similar to *Ferguson v. Modern Farm Systems, Inc.*,¹⁴⁴ where the court applied the incurred risk defense to bar a claim involving a worker whom the evidence revealed was familiar with the risks associated with using only one hand when climbing a ladder.¹⁴⁵ In Judge Friedlander's assessment, that Cole knew about the K-Loader's smaller platform and smaller rails, that he knew the handrails were not allowed to touch the aircraft, and that he knew that the gap was a dangerous condition, all demonstrated that Cole was aware of the specific risks posed by the allegedly dangerous condition of which he complained; thus, Cole voluntarily exposed himself to those risks without inducements or influence from Lantis.¹⁴⁶

In another case involving product liability defenses, *Indianapolis Athletic Club, Inc. v. Alco Standard Corp.*,¹⁴⁷ the court of appeals addressed the issues of misuse, modification, and alteration. The court also dealt with a jury instruction concerning the former "state of the art" defense, as well as an "accident proof" jury instruction.¹⁴⁸ The case involved strict liability and breach of warranty claims by the Indianapolis Athletic Club ("IAC") against Delfield Division of the Alco Standard Corporation ("Delfield") stemming from a fire at the IAC allegedly caused by a defect in the electric cord of a refrigerator that Delfield manufactured. Delfield pled the affirmative defenses of misuse, modification, and state of the art.¹⁴⁹ At trial, Delfield argued that a defect in the electrical outlet caused the fire, not a defect in the refrigerator's cord. After a lengthy jury trial, the jury found in favor of Delfield.¹⁵⁰

IAC appealed, and the court of appeals affirmed. The relevant portion of IAC's appeal focuses upon three product liability issues: (1) "whether there was sufficient evidence to support the trial court's jury instruction regarding misuse, modification, and alteration"; (2) "whether the trial court properly instructed the jury regarding the 'state of the art' defense where the plaintiff's complaint

141. Those cases are *Richardson v. Marrell's, Inc.*, 539 N.E.2d 485 (Ind. Ct. App. 1989) and *Meadowlark Farms, Inc. v. Warken*, 376 N.E.2d 122 (Ind. Ct. App. 1978).

142. *Cole*, 714 N.E.2d at 201 (Friedlander, J., dissenting).

143. *See id.*

144. 555 N.E.2d 1379 (Ind. Ct. App. 1990).

145. *See Cole*, 714 N.E.2d at 202 (Friedlander, J., dissenting).

146. *See id.*

147. 709 N.E.2d 1070 (Ind. Ct. App.), *trans. denied*, 726 N.E.2d 304 (Ind. 1999) (mem.).

148. *Id.* at 1072.

149. *See id.*

150. *See id.*

alleged a manufacturing defect"; and (3) "whether the trial court properly instructed the jury regarding 'accident-proof' products and manufacturer duty."¹⁵¹

With respect to the first issue, IAC did not argue that the misuse/modification jury instruction misstated the law; rather, it argued that there was no evidence introduced at trial to support the instruction.¹⁵² In support of its contrary argument that such evidence existed, Delfield pointed to expert testimony that misuse of the electrical cord by the user is a common cause of fires, that moving the refrigerator could "have caused crimping of the cord," and that rodents could have caused the fire by chewing on the cord.¹⁵³

The court disagreed with Delfield that the evidence was sufficient to justify a misuse/modification instruction.¹⁵⁴ The court wrote that there was no evidence that cord "crimping" ever occurred and, even assuming that moving the refrigerator could cause such "crimping," such action did not modify or alter the refrigerator from its original state, nor could it be considered a misuse.¹⁵⁵ Moreover, according to the court, Delfield reasonably could have foreseen that an IAC employee would move the refrigerator.¹⁵⁶ The court also determined that evidence of rodents chewing on the cord failed to support the instruction because there was no direct evidence on that point, only that rodents were in the general vicinity of the refrigerator.¹⁵⁷ Furthermore, even assuming rodents chewed on the cord, such an occurrence is not an action by a "person," which the IPLA requires.¹⁵⁸

Although the court of appeals agreed with IAC that there was insufficient evidence to support the misuse/modification instruction, the court of appeals also determined that giving the instruction was not reversible error because it did not prejudice IAC.¹⁵⁹

The *Indianapolis Athletic Club, Inc.* court next turned its attention to a "state of the art" instruction the trial court read to the jury. Specifically, IAC argued that giving a state of the art instruction is inconsistent with a claim that a

151. *Id.*

152. The *Indianapolis Athletic Club, Inc.* court quoted sections 33-1-1.5-4(b)(2) and (b)(3) of the Indiana Code in acknowledging the existence of statutory defenses for misuse and modification/alteration. The misuse defense is now found at section 34-20-6-4 of the Indiana Code, and the modification/alteration defense is now found at section 34-20-6-5 of the Indiana Code. According to the *Indianapolis Athletic Club, Inc.* court, "[m]isuse of a product is a defense that completely bars a product liability claim as it is considered an intervening cause that relieves the manufacturer of liability where the intervening act could not have been reasonably foreseen by the manufacturer." *Id.*

153. *Id.* at 1073.

154. *See id.*

155. *Id.*

156. *See id.*

157. *See id.*

158. *Id.* (citing IND. CODE § 33-1-1.5-4(b)(2), -4(b)(3) (1998)).

159. *See id.*

manufacturing defect caused physical harm, which is a strict liability claim.¹⁶⁰ After a brief discussion of *Weller v. Mack Trucks, Inc.*,¹⁶¹ and section 33-1-1.5-4(b) of the Indiana Code, the *Indianapolis Athletic Club, Inc.* court concluded that the state of the art defense applied to IAC's manufacturing defect claim, and was not restricted to design defect theories.¹⁶²

Although the IPLA now provides that "state of the art" is no longer a defense in product liability cases,¹⁶³ the *Indianapolis Athletic Club* opinion should nevertheless be helpful for practitioners who are searching for some explanation about what "state of the art" means. After all, the court found that the instruction at issue correctly stated the law.¹⁶⁴ Practitioners also may read *Indianapolis Athletic Club* as confirmation that the "state of the art" presumption should apply in product liability law regardless of whether the underlying theories sound in strict liability (manufacturing defects) or negligence (design and warning defects).

The third product liability issue the *Indianapolis Athletic Club* court addressed involved the following instruction: "While a manufacturer is under no duty to produce accident-proof products, it is legally under a duty to design and build products that are reasonably fit and safe for the purpose for which they are intended."¹⁶⁵ IAC argued that the instruction was improper because it was tantamount to a "mere accident" instruction.¹⁶⁶ The court of appeals ultimately determined that giving the "accident-proof" instruction was not reversible error.¹⁶⁷ In doing so, however, the court cautioned trial courts that giving such an instruction tends to raise "problems and issues," and that such an instruction should "not be used in future cases."¹⁶⁸

III. PRODUCT IDENTIFICATION IN THE SUMMARY JUDGMENT CONTEXT

Two cases decided during the survey period dealt with product identification

160. *Id.* at 1074.

161. 570 N.E.2d 1341 (Ind. Ct. App. 1991).

162. *See Indianapolis Athletic Club, Inc.*, 709 N.E.2d at 1074.

163. *See id.* at 1074 n.1 ("The state of art defense has been abolished by Public Law 278-1995 and replaced by a rebuttable presumption on state of the art." (citing IND. CODE § 34-20-5-1 (1998))).

164. *See id.* at 1075.

165. *Id.*

166. "Under Indiana law, it is reversible error to instruct the jury that a plaintiff may not recover if his damages are the result of a 'mere' or 'pure' accident." *Id.* (quoting *Weinand v. Johnson*, 622 N.E.2d 1321, 1324 (Ind. Ct. App. 1993)). "This is true because of the danger of varying and ambiguous definitions and interpretations of the word 'accident.' The instruction is misleading because it suggests that the defendant is not liable for causing a 'mere accident' even though the defendant may have been negligent in causing the accident." *Id.* (quoting *Weinard*, 622 N.E.2d at 1324-25).

167. *Id.* at 1077.

168. *Id.*

and the quantum of evidence necessary to survive summary judgment. The appellate panels deciding the two cases appear to have applied Indiana's summary judgment standard differently.

In *Owens Corning Fiberglas Corp. v. Cobb*,¹⁶⁹ the Indiana Court of Appeals reversed the trial court's denial of summary judgment to defendant Owens Corning Fiberglas Corp. ("OC") in an asbestos product liability case. Cobb, a former pipe fitter, sued more than thirty manufacturers or distributors of products allegedly containing asbestos.¹⁷⁰ As the case progressed toward trial, Cobb settled with some defendants and entered into stipulated dismissals with others. Cobb and several defendants, including OC, filed cross-motions for summary judgment.¹⁷¹ OC's motion for summary judgment argued that Cobb failed to provide any evidence that he was exposed to asbestos-containing products manufactured or distributed by OC. The trial court denied without comment OC's motion for summary judgment.¹⁷²

After suffering an adverse judgment at trial, OC filed two motions to correct error seeking a reduction in the damages awarded.¹⁷³ In response to the motions to correct error, the trial court reduced the punitive damages award to three times the compensatory award, but denied all other motions.¹⁷⁴ OC appealed the trial court's denial of summary judgment with respect to its product identification motion and the trial court's grant of partial summary judgment to Cobb with respect to its non-party affirmative defense.¹⁷⁵ The Indiana Court of Appeals reversed, remanding the case to the trial court with instructions to vacate the

169. 714 N.E.2d 295 (Ind. Ct. App. 1999), *trans. granted*, No. 49A04-9801-CV-46, 2000 Ind. LEXIS 60 (Jan. 19, 2000).

170. *See id.* at 297.

171. Cobb's motion for summary judgment asserted that OC had not presented sufficient evidence to support its affirmative defenses, including a non-party defense. *See id.* at 298.

172. *See id.* The trial court also granted Cobb's motion for partial summary judgment regarding OC's affirmative defenses, except for the defense of contributory fault. *See id.*

173. OC's first motion to correct errors argued that the punitive damages award was excessive and subject to the statutory limitations contained in section 34-4-34-4 of the Indiana Code. OC's second motion requested a new trial on the issue of damages or a remittitur. *See id.* at 299. The trial court entered judgment for plaintiffs in the amount of \$544,682 in compensatory damages and \$1,634,046 in punitive damages. *See id.* at 300. The jury initially returned a punitive damages award of \$15 million, which the trial court reduced pursuant to section 34-4-34-4 of the Indiana Code. *See id.* at 297. Cobb also filed a motion to correct error, contending that the trial court should have offset the amount of compensatory damages awarded by funds Cobb received from settlements with other defendants because the jury had found OC to be 100% at fault. *See id.*

174. *See id.* at 297. The trial court also granted a stay of enforcement of judgment pending OC's appeal and Cobb's cross-appeal. *See id.*

175. *See id.* Cobb cross-appealed the trial court's award of damages, claiming that Indiana's Tort Claims Act unconstitutionally limited his right to punitive damages and that his compensatory damages should not have been offset by amounts received by settlements with other defendants. *See id.* Because the court of appeals decided the case on product identification issues, the court never reached any of OC's nonparty arguments or any of Cobb's cross-appeal arguments.

damage awards and to enter summary judgment in favor of OC.¹⁷⁶

OC argued that Cobb failed to provide any evidence proving that he was exposed to asbestos-containing products manufactured or distributed by OC.¹⁷⁷ The court of appeals directly quoted much of the evidence OC designated in support of its motion. OC's designated evidence of record revealed that Cobb had heard of "Kaylo," that he knew it was a pipe covering insulation, and that it was associated with Owens Corning.¹⁷⁸ Cobb never personally installed Kaylo products.¹⁷⁹ He did, however, occasionally remove and repair pipe covering previously installed by other crews.¹⁸⁰ He allegedly did not know what company manufactured the pipe covering he removed and repaired because it did not bear any brand names or other identifying features.¹⁸¹

OC's designation of Cobb's testimony further revealed that Cobb had been on job sites where Kaylo was used while working for Indianapolis Public Schools and that Cobb believed he was exposed to airborne asbestos particles because insulators were installing pipe covering in his general area at those sites.¹⁸² Cobb testified that he thought he first began working around insulators using Kaylo in 1963 or 1964, but he could not recall at which school or schools Kaylo was used.¹⁸³ He likewise could not recall any other particular place where he would have seen Kaylo being installed.¹⁸⁴ In addition, Cobb testified that he never personally ordered any Kaylo product; he could identify Kaylo only because he recalled seeing boxes of that product at various locations.¹⁸⁵

In light of the foregoing facts of record, the court of appeals determined that OC's designated evidence was sufficient to pass the burden to Cobb to establish a genuine issue of material fact:

In construing the above evidence in favor of Cobb as the nonmoving party, we can conclude only that Cobb *may* have been exposed to Kaylo asbestos fibers at some time during his work for Indianapolis Public Schools. There is no evidence whatsoever that Cobb actually installed or removed Kaylo himself, and there exists only the possibility that the insulators installed or removed Kaylo when Cobb was present at an undetermined jobsite.

To further conclude that the insulators' work actually released Kaylo asbestos fibers into the air and that Cobb actually inhaled those fibers

176. *See id.* at 303-04.

177. *See id.* at 300.

178. *Id.*

179. *See id.* at 300-01.

180. *See id.* at 301.

181. *See id.*

182. *See id.*

183. *See id.*

184. *See id.*

185. *See id.*

into his lungs would require an even more tenuous reliance on mere inferences, not facts. Finally, to conclude that Kaylo asbestos fibers actually caused Cobb's injuries would stretch the chain of logic to the breaking point. Cobb cited a Seventh Circuit asbestos case to support his argument, but we need look no further than *Roberson*[v. *Hicks*, 694 N.E.2d 1161, 1163 (Ind. Ct. App. 1998), *trans. denied*, 706 N.E.2d 170 (Ind. 1998)] to establish that Cobb's burden to prove causation "may not be carried with evidence based merely on supposition or speculation." Because OC's designated evidence shows there was no genuine issue of material fact with respect to the causation of Cobb's injuries, the burden then passes to Cobb to establish the contrary.¹⁸⁶

In response, plaintiffs/appellees argued that because Cobb testified that Kaylo was present at a job site where he worked and that he removed pipe covering, it could be inferred that the pipe covering removed by Cobb was Kaylo and that the act of removal exposed Cobb to OC's asbestos-containing Kaylo.¹⁸⁷ Plaintiffs/appellees further argued that because Cobb testified that he saw boxes on his job site with the words "Owens Corning" and "Kaylo" printed on them, it could be inferred that the Kaylo boxes Cobb saw were used for pipe covering insulation and that Cobb could have been exposed to the Kaylo in the course of his work with the pipes.¹⁸⁸

According to the court of appeals, such evidence, "though voluminous, fails to demonstrate a genuine issue of material fact as to whether Cobb was ever actually exposed to Kaylo asbestos fibers, let alone whether exposure to Kaylo caused his injuries."¹⁸⁹ The court's concluding rationale is as follows:

Although Cobb's testimony places an undetermined number of boxes containing Kaylo at an undetermined number of jobsites at which he worked, it contains no facts from which the trial court could conclude that Cobb had been exposed to Kaylo asbestos fibers—whether from work performed by Cobb himself or by others. If anything, the additional deposition pages designated by Cobb actually strengthen OC's assertion that Cobb's exposure claim was based solely on conjecture—especially when one considers that the insulators also used Armstrong products when working in Cobb's vicinity. Certainly, one could draw the inference that Cobb was exposed to Kaylo asbestos fibers if Kaylo was installed or removed in his presence, but we strongly reiterate that an inference may fail as a matter of law when it 'can rest on no more than speculation or conjecture.' . . . Without concrete facts to support his inference of exposure, Cobb cannot show the existence of a genuine issue of material fact regarding OC's causation of his injuries. Therefore, the trial court erred in denying OC's motion for summary

186. *Id.* at 302 (emphasis added) (citation and footnote omitted).

187. *See id.*

188. *Id.*

189. *Id.*

judgment based upon lack of product identification.¹⁹⁰

Judge Riley offered a dissenting opinion in which she concluded that Cobb produced sufficient evidence to support an inference that he inhaled asbestos dust produced by OC during his tenure at IPS.¹⁹¹ Judge Riley's opinion further disagrees with the majority's treatment of burden shifting in light of Indiana's divergence from federal law in this area after *Jarboe v. Landmark Community Newspapers of Indiana*.¹⁹² According to Judge Riley, "[m]erely alleging that Cobb has failed to produce evidence of causation, an essential element to Cobb's case, is insufficient to entitle Owens-Corning to summary judgment under Indiana law."¹⁹³ Finally, while conceding that no Indiana appellate court has yet established a test for causation in asbestos cases, Judge Riley approves of what she termed the "job site" test for causation as stated in *Peerman v. Georgia-Pacific Corp.*¹⁹⁴

In a case involving a procedural issue virtually identical to the one in *Cobb*, the court of appeals reached a seemingly different result and, perhaps indicative of Cobb's ultimate fate, the Indiana Supreme Court has denied transfer. In *Lenhardt Tool & Die Co. v. Lumpe*,¹⁹⁵ Lumpe was injured in an explosion at a brass melting facility. Lenhardt apparently manufactured some of the molds used at the facility at the time of the explosion, but no one could identify or locate the molds and plugs used at the time of the explosion.¹⁹⁶

Lenhardt filed a motion for summary judgment because Lumpe could not prove that Lenhardt negligently manufactured the molds at issue. In the court of appeals, Lenhardt again pressed the procedural aspect of the case by contending that once it demonstrated that Lumpe could not prove the mold was manufactured by Lenhardt, the burden shifted to Lumpe pursuant to Rule 56 of the Indiana Rules of Trial Procedure to come forward with evidence to prove the mold was manufactured by Lenhardt.¹⁹⁷ If Lumpe failed to do so, Lenhardt argued, it was entitled to summary judgment.

The court of appeals disagreed in light of what a majority of the panel in *Lenhardt* called the "contrast between the federal practice as expressed in *Celotex Corp. v. Catrett*¹⁹⁸ and our state practice as expressed in *Jarboe [v. Landmark Community Newspapers]*."¹⁹⁹ According to a majority of the *Lenhardt*

190. *Id.* at 303 (citations omitted).

191. *See id.* at 304 (Riley, J., dissenting).

192. 644 N.E.2d 118, 123 (Ind. 1994).

193. *Cobb*, 714 N.E.2d at 305 (Riley, J., dissenting).

194. *Id.* (citing *Peerman*, 35 F.3d 284, 287 (7th Cir. 1994)).

195. 703 N.E.2d 1079 (Ind. Ct. App. 1998), *trans. denied*, 722 N.E.2d 824 (Ind. 2000). *See supra* notes 67-85 and accompanying text for more detailed analysis of *Lenhardt Tool & Die Co.*'s substantive merits.

196. *See id.* at 1081.

197. *See id.*

198. 477 U.S. 317 (1986).

199. *Lenhardt Tool & Die Co.*, 703 N.E.2d at 1081 (citing *Jarboe v. Landmark Community*

court, *Jarboe* requires Lenhardt to first designate evidence that Lenhardt did not manufacture the mold in order to require Lumpe to come forward with evidence that Lenhardt manufactured it.²⁰⁰ “Simply demonstrating that Lumpe does not have sufficient evidence to prove the mold was manufactured by Lenhardt is not enough.”²⁰¹ Accordingly, the majority of the *Lenhardt Tool & Die Co.* panel held that the trial court properly denied Lenhardt’s motion for summary judgment on the negligence claim.²⁰²

Judge Garrard dissented, disagreeing with the majority’s conclusion that Lenhardt had to designate some evidence that it did not manufacture the mold in order to secure summary judgment.²⁰³ In Judge Garrard’s view, “[i]t would have been sufficient for summary judgment had Lenhardt been able to show that Lumpe had no evidence that Lenhardt made the mold and would not be able to get anything further.”²⁰⁴

On January 31, 2000, Justices Dickson and Sullivan of the Indiana Supreme Court voted to deny transfer in *Lenhardt Tool & Die Co.*²⁰⁵ Justice Boehm and Chief Justice Shepard voted to accept transfer. Justice Rucker did not participate. Although there was no majority with respect to the transfer decision, the petition was deemed denied pursuant to Indiana Appellate Rule 11(B)(5). Justice Boehm wrote an opinion dissenting from the order denying transfer, which Chief Justice Shepard joined. In his dissenting opinion, Justice Boehm wrote that he believed that the court should grant transfer to clarify Indiana’s summary judgment standard. Justice Boehm concluded that the majority opinion in *Lenhardt Tool & Die Co.* “reflects a widespread misunderstanding of how the summary judgment standard is to work under Trial Rule 56.”²⁰⁶

Both *Cobb* and *Lenhardt Tool & Die Co.* are product identification cases in which the motions for summary judgment turned on the sufficiency of the plaintiffs’ designated evidence. The Indiana Supreme Court appears poised to address in *Cobb* whether and to what extent tension exists between how the court

Newspapers, 644 N.E.2d 118 (Ind. 1994)).

200. See *id.* at 1083.

201. *Id.*

202. See *id.*

203. See *id.* at 1085 (Garrard, J., dissenting).

204. *Id.* at 1086.

205. See 722 N.E.2d 824 (Ind. 2000).

206. *Id.* at 825 (Boehm, J., dissenting). Justice Boehm wrote that the *Jarboe* holding has been understood by some, including the Court of Appeals in [*Lenhardt*], to require Lenhardt to establish a negative proposition, i.e., that the mold did not come from Lenhardt.¹ In my view, this is an incorrect reading of Trial Rule 56, and of *Jarboe*, and leads to unnecessary expense to litigants and to unwarranted demands on judicial resources. Rather than require that Lenhardt prove that the mold came from someone else, I believe it was sufficient for summary judgment that Lenhardt establish (i.e., show that there is no genuine issue of material fact bearing on the issue) that Lumpe could not carry his burden of proof at trial that the mold was from Lenhardt.

Id.

of appeals disposed of the cases. Clearly, Justice Boehm's dissenting opinion from the denial of transfer in *Lenhardt Tool & Die Co.* reveals that the issue is one to which the court is giving some consideration.

Celotex, the case out of which the now-famous federal summary judgment standard arose, was an asbestos case. As many product liability practitioners well know, such cases nearly always hinge on a claimant's ability to properly identify or recall the allegedly offending product or products that caused or contributed to his or her injuries. Defense practitioners often have argued that the *Celotex* standard is both helpful in and necessary to achieving some judicial control over litigation. Indiana's disavowment of *Celotex*, to the extent that there is one, occurred in a more traditional setting. Indeed, *Jarboe* was a wrongful discharge case. Thus, in cases such as *Lenhardt Tool & Die Co.* and *Cobb*, in which product identification is an essential, threshold issue, the Indiana Supreme Court in *Cobb* may feel the need to examine the propriety and utility of adherence to a *Jarboe* summary judgment standard.

IV. USE OF EXPERTS IN A PRODUCT LIABILITY CONTEXT

In *Howerton v. Red Ribbon, Inc.*,²⁰⁷ Stanley Howerton used a grab bar to pull himself out of a hotel bathtub. As he pulled on the bar, it came out of the wall. Howerton fell as a result and injured his knee.²⁰⁸ The Howertons initially sued the motel owner and franchisor and later added a product liability claim against Sterling Plumbing Group. The Howertons' claim against Sterling alleged negligence in design and manufacture of the grab bar unit and that the unit was in a defective condition unreasonably dangerous to Howerton.²⁰⁹

At trial, the judge conducted a hearing on Sterling's motion in limine challenging the admissibility of testimony by the Howertons' engineer, James McCann. The trial judge concluded that the expert testimony would confuse the jury and was not supported by reliable scientific principles.²¹⁰ The trial court did allow McCann to testify as a fact witness about what he observed when examining the unit and to identify himself as an engineer. McCann testified that when he examined the grab bar under a microscope, he observed microscopic signs of wear near the hole on one end of the bar.²¹¹

At the conclusion of the Howertons' presentation of liability evidence, the trial court granted judgment on the evidence to each defendant, and the court of appeals affirmed.²¹² In their appeal, the Howertons first argued that the trial court erred in applying the *Daubert*²¹³ standard to McCann's testimony because

207. 715 N.E.2d 963 (Ind. Ct. App. 1999), *trans. denied*, No. 18A02-9806-CV-504, 2000 Ind. LEXIS 89 (Ind. Feb. 4, 2000).

208. *See id.* at 965.

209. *See id.*

210. *See id.*

211. *See id.*

212. *See id.*

213. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

McCann was providing technical, not scientific testimony.²¹⁴ After writing that trial courts must consider Rules 403 and 702 of the Indiana Rules of Evidence in determining whether to exclude expert testimony, the court itemized in great detail many factors that affected the foundation of McCann's testimony.²¹⁵

For example, McCann did not examine the entire unit, he did not remove the unit to examine its back, he did not know whether any water damage to the unit had occurred, he had not performed any tests on the unit or on the grab bar, nor did he test exemplars.²¹⁶ According to the court, McCann did not know about any of the following: (1) how the unit was installed or manufactured; (2) which end of the grab bar had come from which hole in the unit; (3) whether any other Sterling units had failed; (4) the unit's condition when it left Sterling; (5) the strength of the bar; or (6) Sterling's manufacturing procedures for installing a grab bar in a unit.²¹⁷ Moreover, McCann had not reviewed design standards for grab bars, had no evidence regarding the condition of the unit at the time it was installed, did not know the strength or exact composition of the unit's fiberglass, and had performed no research seeking literature related to grab bars or similar units.²¹⁸

In light of the fact that McCann did not undertake such tasks, the court of appeals agreed with the trial court that "McCann's opinion of a defect in the manufacturing and design of the unit would not be reliably or scientifically 'connected' to the principles of engineering, and any such opinion by him is thereby rendered more likely to be 'subjective belief or unsupported speculation.'"²¹⁹ The court of appeals then pointed out that the Howertons did not challenge the trial court's finding that McCann's expert testimony would confuse the jury, and held that such ruling was not an abuse of discretion.²²⁰

The court of appeals also briefly addressed the propriety of the trial court's grant of judgment of the evidence to Sterling.²²¹ On that issue, the Howertons argued that judgment on the evidence was improper because there was testimony about the possibility that a cotter pin might never have been installed at one end

214. See *id.* at 966. In *Kuhmo Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the Supreme Court expanded the *Daubert* reliability requirements to experts testifying about non-scientific principles. Rule 702(b) of the Indiana Rules of Evidence presently requires an Indiana court's satisfaction that the scientific principles upon which the expert testimony rests are reliable.

215. See *Howerton*, 715 N.E.2d at 966.

216. See *id.*

217. See *id.*

218. See *id.* at 966-67.

219. *Id.* at 967 (citing *Hottinger v. Trugreen Corp.*, 965 N.E.2d 593, 596 (Ind. Ct. App. 1996)).

220. See *id.* Because the *Howerton* court found no abuse of discretion in the trial court's decision to exclude McCann's testimony because it would confuse the jury, the court declined to address the Howertons' argument that McCann's expert testimony was technical rather than scientific in nature and, therefore, not subject to a determination by the trial court concerning the reliability of the testimony's underpinnings. See *id.* at 967 n.3.

221. See *id.* at 967.

of the bar.²²² At trial, a contractor involved in the construction of more than a hundred motels and who had supervised the installation of several thousand bath/shower units opined about the possibility of a missing cotter pin. The contractor testified, "[I]n things mechanical, practically anything is possible I think."²²³

According to the *Howerton* court, such testimony does not constitute the testimony of a fact being possible as contemplated by the court's earlier opinion in *Noblesville Casting Division of TRW, Inc. v. Prince*,²²⁴ the case upon which the Howertons relied.²²⁵ Thus, the court could not reverse the trial court's decision to grant judgment on the evidence to Sterling.²²⁶

Howerton does not directly tackle the issue of the trial court's application of *Daubert* to technical testimony. Practitioners should nevertheless be aware of the U.S. States Supreme Court's decision in *Kuhmo Tire Co. v. Carmichael*²²⁷ to apply *Daubert* requirements in non-scientific cases. Although Rule 702 of the Indiana Rules of Evidence contemplates a *Daubert*-like reliability analysis only in cases involving "expert scientific testimony," it will be interesting to see whether Indiana courts now may be more willing to apply *Daubert* in non-scientific cases in light of *Kuhmo Tire*. It also remains to be seen whether Rule 702 of the Indiana Rules of Evidence will be amended or revised in light of *Kuhmo Tire*.

V. STATUTES OF REPOSE AND LIMITATION

A. The Asbestos Trio

Beginning in February and continuing through the spring of 1999, the Indiana Court of Appeals issued a trio of opinions addressing Indiana's limitation of action provisions as those provisions apply to claims involving damages allegedly caused by exposure to asbestos. The cases in which the court of appeals offered those opinions are *Sears Roebuck and Co. v. Noppert*,²²⁸ *Novicki v. Rapid-American Corp.*,²²⁹ and *Holmes v. ACandS, Inc.*²³⁰

The plaintiffs in *Noppert* filed a product liability suit against several defendants, including Sears, alleging damages as the result of exposure to asbestos. Sears filed a motion for summary judgment arguing that the repose

222. *See id.*

223. *Id.* (citing the trial record).

224. 438 N.E.2d 722 (Ind. 1982).

225. *See Howerton*, 715 N.E.2d at 967.

226. *See id.*

227. 526 U.S. 137 (1999).

228. 705 N.E.2d 1065 (Ind. Ct. App. 1999), *trans. denied*, 726 N.E.2d 300 (Ind. 1999).

229. 707 N.E.2d 322 (Ind. Ct. App. 1999).

230. 709 N.E.2d 36 (Ind. Ct. App. 1999), *trans. denied*, 726 N.E.2d 314 (Ind. 1999).

period in section 33-1-1.5-5 of the Indiana Code²³¹ barred the Nopperts' claims.²³² Section 33-1-1.5-5 of the Indiana Code provided, in relevant part, that "a product liability action must be commenced within two (2) years after the cause of action accrues or within ten (10) years after the delivery of the product to the initial user or consumer."²³³ There is no indication in the court's opinion that either party disputed that the Nopperts failed to file their lawsuit within ten years after delivery of the allegedly offending products to the initial user or consumer.

The trial court granted Sears' motion for summary judgment twenty-three days after it was filed.²³⁴ The Nopperts then filed a motion to vacate the trial court's entry of summary judgment because the trial court did not afford them the thirty days allowed under Rule 56 of the Indiana Rules of Trial Procedure in which to respond to a motion for summary judgment. The court denied the Nopperts' motion shortly after it was filed.²³⁵ Thirty-three days after the court denied the Nopperts' motion to vacate, the Nopperts filed a motion to correct errors, again claiming that the trial court did not allow them adequate time to respond to the summary judgment motion. The trial court granted the motion to correct errors.²³⁶

Sears appealed the trial court's grant of the Nopperts' motion to correct errors, arguing that the Nopperts failed to file the motion within the thirty days provided by the Indiana Rules of Trial Procedure, and because, in any event, the Nopperts did not have a meritorious defense to the summary judgment motion.²³⁷ The Nopperts countered by arguing that the trial court could properly consider the motion to correct errors as a motion filed pursuant to Rule 60(B) of the Indiana Rules of Trial Procedure and, therefore, the trial court's granting of the motion was not an abuse of discretion.²³⁸

The court of appeals disagreed with the Nopperts, recognizing that "a [Rule] 60(B) motion is not an appropriate substitute for the timely filing of an appeal,

231. Now, IND. CODE § 34-20-3-1 (1998).

232. See *Noppert*, 705 N.E.2d at 1066.

233. The Code also provides that "if the cause of action accrues at least eight (8) years but less than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues." IND. CODE § 34-20-3-1(b) (formerly, IND. CODE § 33-1-1.5-5(b)). As the statute makes clear, a claimant must bring a product liability action in Indiana within two years after it accrues, but in any event, not longer than ten years after the product is first delivered to the initial user or consumer. Such is true unless the action accrues in the ninth or tenth year after delivery, in which case the full two-year period is preserved, commencing on the date of accrual. Accordingly, the longest possible time period in which a claimant may have in which to file a product liability claim in Indiana is twelve years after delivery to the initial user or consumer, assuming accrual at some point in the twelve months immediately before the tenth anniversary of delivery. See *id.*

234. See *Noppert*, 705 N.E.2d at 1066.

235. See *id.* at 1066-67.

236. See *id.* at 1067.

237. See *id.*

238. See *id.*

pursuant to Ind[iana] Appellate Rule 2, based upon issues known or discoverable within the thirty days available to pursue an appeal."²³⁹ In addition, the court stated that "[r]elief is only properly provided under Rule 60(B) after a failure to perfect an appeal when there is some *additional fact* present justifying extraordinary relief which allows a trial court to invoke its equitable power to do justice."²⁴⁰ According to the court, it was "clear from the record that the Nopperts were aware of the trial court's summary judgment ruling well before the thirty days for filing an appeal had elapsed."²⁴¹ Thus, the court found no extraordinary factors to justify the filing of a Trial Rule 60(B) motion.²⁴²

The second portion of the court of appeals' analysis focused upon the propriety of the Nopperts' defense at trial because Indiana law required them to show that they had a meritorious defense to Sears' summary judgment motion if the court was to consider their motion to correct errors a Trial Rule 60(B) motion.²⁴³ In that connection, the court of appeals concluded that, as a matter of law, the Nopperts did not have a meritorious defense because the statute upon which they relied as the exception to the application of the statute of repose did not apply to Sears.²⁴⁴ The Nopperts argued that section 33-1-1.5-5.5 of the Indiana Code²⁴⁵ is a statutory exception to application of the ten-year statute of repose in asbestos cases. The Nopperts also relied on the Indiana Supreme Court's decision in *Covalt v. Carey Canada, Inc.*²⁴⁶

Section 33-1-1.5-5.5 of the Indiana Code did, indeed, provide an exception to the product liability statute of limitations and statute of repose:

(a) A product liability action that is based on: (1) property damage resulting from asbestos; or (2) personal injury, disability, disease, or death resulting from exposure to asbestos must be commenced within two (2) years after the cause of action accrues. The subsequent development of an additional asbestos related disease or injury is a new injury and is a separate cause of action.

(b) A product liability action for personal injury, disability, disease, or death resulting from exposure to asbestos accrues on the date when the injured person knows that the person has an asbestos related disease or injury.

* * *

239. *Id.*

240. *Id.* (emphasis added) (quoting 4 WILLIAM F. HARVEY, INDIANA PRACTICE 174 (1991)).

241. *Id.*

242. *See id.*

243. *See id.*

244. *See id.* at 1068.

245. Now, IND. CODE § 34-20-3-2 (1998).

246. 543 N.E.2d 382 (Ind. 1989).

(d) This section applies only to product liability actions against: (1) persons who mined and sold commercial asbestos; and (2) funds that have, as a result of bankruptcy proceedings or to avoid bankruptcy proceedings, been created for the payment of asbestos related disease claims or asbestos related property damage claims.²⁴⁷

The court of appeals determined, however, that the statutory language in section (d) controls and that the "discovery rule" exception to the statute of repose applies only against persons who mined and sold commercial asbestos and against funds described in that section.²⁴⁸ Because the court determined that Sears does not fall into either category, the "discovery rule" exception in section 33-1-1.5-5.5 of the Indiana Code does not apply to it.²⁴⁹

In *Novicki*, the estate of a deceased welder filed a wrongful death action against Rapid-American Corporation ("Rapid") and forty-four other defendants.²⁵⁰ On October 19, 1993, the decedent was diagnosed with mesothelioma, a malignant tumor principally caused by exposure to asbestos. He died from that disease on March 4, 1995. His estate filed suit on March 4, 1997.²⁵¹

Rapid and several other defendants filed a motion to dismiss, arguing that *Novicki's* complaint had not been commenced within the statute of limitations found in section 33-1-1.5-5.5 of the Indiana Code.²⁵² The court's opinion refers to the provision as "Section 5.5." Rapid and its co-defendants based their argument on language in section 5.5, providing that product liability actions based on "personal injury, disability, disease, or death resulting from exposure to asbestos" must be initiated within two years from the date that the "injured person knows that the person has an asbestos related disease or injury."²⁵³ Because plaintiff's wrongful death claim was not filed within two years of

247. IND. CODE § 33-1-1.5-5.5 (recodified at IND. CODE § 34-20-3-1 (1998)).

248. *Noppert*, 705 N.E.2d at 1068. With respect to the first category of defendants (miners and sellers), the court made it clear that the entities to which the statute applies are entities that both mined *and* sold commercial asbestos: "[W]hile courts in Indiana have on occasion construed an 'and' in a statute to be an 'or,' we find that there is no ambiguity in this statute requiring such an interpretation." *Id.*

249. On petition to transfer to the Indiana Supreme Court, the *Nopperts* argued, in part, that the court of appeals' interpretation of section 33-1-1.5-5.5 of the Indiana Code violated article 1, sections 12 and 23 of the Indiana Constitution. The Indiana Supreme Court denied transfer on August 18, 1999, without issuing an opinion. See *Noppert*, 1999 Ind. LEXIS 691.

250. See *Novicki v. Rapid-American Corp.*, 707 N.E.2d 322, 322 (Ind. Ct. App. 1999).

251. See *id.*

252. As the *Novicki* court aptly recognized in footnote four of its opinion, the Indiana General Assembly in 1998 amended in part and recodified the IPLA. See *id.* at 323 n.4. The new statutory provisions for the IPLA are found in sections 34-20-1-1 to 34-20-9-1 of the Indiana Code. See *id.* Only minor, non-substantive changes were made to the sections of the Act at issue in *Novicki*. See *id.*

253. *Id.* at 323.

October 19, 1993, the date when the decedent was first diagnosed with mesothelioma, the trial court agreed with Rapid's argument and dismissed the claim as untimely.²⁵⁴

The court of appeals reversed and remanded without addressing whether section 5.5 time-barred plaintiffs' claims.²⁵⁵ Instead, the *Novicki* court pointed out that section 5.5 does not apply to Rapid.²⁵⁶ Recognizing the court's holding in *Noppert*,²⁵⁷ the *Novicki* court agreed that the two-year "discovery" rule stated in section 5.5 applies only to product liability actions against persons who mined and sold commercial asbestos and to product liability actions against funds which have been created as a result of bankruptcy proceedings for the payment of asbestos related disease claims or asbestos related damage claims.²⁵⁸ Because Rapid did not both mine and sell commercial asbestos, the court held that it could not invoke section 5.5 and rely upon it as a basis for dismissal of plaintiff's complaint.²⁵⁹ The court stated:

Rapid-American cannot invoke section 5.5 merely for the sake of argument; the section does not apply since Rapid-American never mined and sold commercial asbestos. Thus, we must conclude that to the extent the trial court relied upon Section 5.5 instead of Section 5, *Novicki's* complaint was improperly dismissed as untimely.²⁶⁰

The "Section 5" to which the court refers is section 33-1-1.5-5 of the Indiana Code,²⁶¹ which, as noted above, embodies Indiana's general limitation of action provisions for product liability cases. Rather than attempt to analyze the case under section 5 and the applicable case law without any briefing from the parties, the *Novicki* court simply remanded the case to the trial court for further proceedings and additional argument with respect to the applicability of section 5 to the underlying facts.²⁶²

*Holmes*²⁶³ is a case that involves exactly the same issue the parties presented in *Novicki*. However, the court of appeals panel considering *Holmes* chose not to dispose of the case in quite the same fashion as did the panel in *Novicki*. The

254. See *id.*

255. See *id.*

256. See *id.* at 324.

257. See *id.* at 324 n.6.

258. *Id.* at 324.

259. See *id.*

260. *Id.* In *Novicki*, Rapid assumed for the sake of argument that the statute of limitations in section 33-1-1.5-5.5 of the Indiana Code (now codified at section 34-20-3-2) applied to it notwithstanding section 33-1-1.5-5 of the Indiana Code (now section 34-20-3-1) and its alternative argument that the latter statute time-barred plaintiffs' claims as well. See *Novicki*, 707 N.E.2d at 324.

261. IND. CODE § 33-1-1.5-5 (recodified at § 34-20-3-1 (1998)).

262. See *Novicki*, 707 N.E.2d at 324-25.

263. *Holmes v. ACandS, Inc.*, 707 N.E.2d 36 (Ind. Ct. App. 1999), *trans. denied*, 726 N.E.2d 314 (Ind. 1999).

Holmes court addressed the issue as the parties presented and argued it.

In *Holmes*, plaintiff's decedent was diagnosed with lung cancer in June 1994 and died of that disease about a month later, on July 22, 1994. Two years to the day that plaintiff's decedent died, July 22, 1996, plaintiff filed suit individually and as personal representative of the decedent's estate.²⁶⁴ Several defendants filed motions for summary judgment based upon what is now section 34-20-3-2 of the Indiana Code,²⁶⁵ which, as noted above, provides:

- (a) A product liability action that is based upon:
 - (1) property damage resulting from asbestos; or
 - (2) personal injury, disability, disease, or death resulting from exposure to asbestos;must be commenced within two (2) years after the cause of action accrues. The subsequent development of an additional asbestos related disease or injury is a new injury and is a separate cause of action.
- (b) A product liability action for personal injury, disability, disease, or death resulting from exposure to asbestos accrues on the date when the injured person knows that the person has an asbestos related disease or injury.²⁶⁶

Because the plaintiff's wrongful death claim was not filed within two years of June 20, 1994, the date on which the decedent knew that he had an asbestos related disease, the trial court granted summary judgment to several defendants and dismissed with prejudice the remaining defendants.²⁶⁷

The court of appeals reversed, holding that a product liability claim for wrongful death resulting from an asbestos related disease or injury accrues on the date when the decedent died.²⁶⁸ In its appeal, the decedent's estate argued that the decedent's death is a separate injury from his cancer and, as such, a wrongful death action is not barred by the two-year statute of limitations now found in section 34-20-3-2 of the Indiana Code.²⁶⁹ Although the court did not necessarily agree that the date of the decedent's diagnosis had absolutely no bearing upon the wrongful death claim, the court disagreed with the defendants' contention that Indiana's wrongful death statute requires a wrongful death action to be filed within a time when the decedent might have brought it had he lived.²⁷⁰ "A plain reading of the statute indicates that the time of the decedent's death is determinative of what actions the decedent 'might have maintained,' not the time the action is ultimately brought."²⁷¹

264. See *id.* at 38.

265. Formerly, IND. CODE § 33-1-1.5-5.5. Because the court in *Holmes* refers to the present statutory cites, this survey will do the same.

266. *Id.* § 34-20-3-2.

267. See *Holmes*, 709 N.E.2d at 38.

268. See *id.* at 44.

269. See *id.* at 38.

270. See *id.* at 40.

271. *Id.* The *Holmes* court expressed no opinion regarding whether *Holmes*'s action would

With respect to the interpretation of the general assembly's language in what is now section 34-20-3-2 of the Indiana Code, the court first recognized that "[w]hile the cause of action for wrongful death accrues upon the date of the death of the decedent, a product liability action for personal injury accrues when the plaintiff knows or should have discovered his injury or disease."²⁷² The court then determined that section 34-20-3-2(b) of the Indiana Code does not specifically address accrual of an action for "death."²⁷³ The court's threshold reasoning with respect to its interpretation of the language in section 34-20-3-2 of the Indiana Code is as follows:

We presume that the legislature was aware of the Wrongful Death Statute when it enacted Ind.Code § 34-20-3-2, and chose not to provide for a different accrual date for wrongful death actions based upon product liability. Because we have the authority and responsibility to interpret the intentions of the legislature by deciding when a cause of action accrues, we conclude that a product liability cause of action for wrongful death resulting from exposure to asbestos accrues upon the date of death.²⁷⁴

Several of the appellees in *Holmes* sought an opinion on rehearing confirming that nothing in the *Holmes* opinion may be read to conflict with the court's earlier opinions in *Noppert* and *Novicki*. In a short opinion on rehearing, the court of appeals, indeed, reaffirmed that there is no conflict between its original opinion in *Holmes* and its earlier decisions in *Noppert* and *Novicki*.²⁷⁵

B. The Statute of Repose

Section 34-20-3-1(b) of the Indiana Code provides, in relevant part, that a product liability action "must be commenced within two (2) years after the cause of action accrues or within ten (10) years after the delivery of the product to the initial user or consumer."²⁷⁶ The latter of those clauses is generally referred to as Indiana's statute of repose.

Although not product liability cases, the Indiana Supreme Court's decisions

be barred if more than two years had transpired between his discovery of the injury and his death. *See id.*

272. *Id.* at 41. Although the court inserted the phrase "should have discovered," section 34-20-3-2(b) of the Indiana Code does not require that standard. The statute requires actual knowledge. "A product liability action for personal injury, disability, disease, or death resulting from exposure to asbestos accrues on the date when the injured person knows that the person has an asbestos related disease or injury." IND. CODE § 34-20-3-2(b) (1998).

273. *Holmes*, 709 N.E.2d at 41.

274. *Id.* (citation omitted).

275. *See Holmes v. ACandS, Inc.*, 711 N.E.2d 1289 (Ind. Ct. App. 1999).

276. IND. CODE § 34-20-3-1(b) (1998). The statute also recognizes that "if the cause of action accrues at least eight (8) years but less than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues." *Id.*

in *Martin v. Richey*²⁷⁷ and in *Van Dusen v. Stotts*²⁷⁸ may have some impact on product liability cases, particularly those cases involving injuries that have prolonged latency periods. In *Martin*, the supreme court held that, although not unconstitutional on its face, the occurrence-based statute of limitations in Indiana's Medical Malpractice Act²⁷⁹ violates article 1, sections 12 and 23 of the Indiana Constitution insofar as it applies to *Martin*.²⁸⁰

The *Martin* case involved an alleged claim of medical malpractice against a physician for failure to appropriately diagnose and treat her breast cancer.²⁸¹ *Martin* did not "discover" her condition until more than two years from the "occurrence" of the alleged malpractice and, therefore, beyond the Act's two-year limitations period.²⁸² In such a situation, the *Martin* court determined that application of the two-year occurrence-based statute of limitations is unconstitutional under article 1, section 23 of the Indiana Constitution because it is not "uniformly applicable" to all medical malpractice victims given that victims such as *Martin* are precluded from pursuing a claim in light of the prolonged period of time between the alleged act of malpractice and the discovery of their condition.²⁸³ According to the court, the statute of limitations, as applied to *Martin*, is also unconstitutional under article 1, section 12 of the Indiana Constitution because it requires *Martin* to file a claim before she is able to discover the alleged malpractice and her resulting injury.²⁸⁴

Practitioners pondering just exactly how Indiana courts would interpret the *Martin* court's effort to limit its holding to the circumstances presented there did not have to wait very long for their answer, at least in the context of the IPLA's ten-year statute of repose. The court's pronouncement came in the form of a 3-2 decision in the case of *McIntosh v. Melroe Co.*²⁸⁵ On May 26, 2000, the court held that the ten-year statute of repose contained in the IPLA does not violate sections 12 or 23 of article 1 of the Indiana Constitution.²⁸⁶

Many product liability practitioners had been keeping an eye on the *McIntosh*

277. 711 N.E.2d 1273 (Ind. 1999).

278. 712 N.E.2d 491 (Ind. 1999).

279. IND. CODE § 34-18-7-1(b).

280. See *Martin*, 711 N.E.2d at 1285.

281. See *id.* at 1276-77.

282. *Id.* at 1277.

283. *Id.* at 1279.

284. See *id.*

285. 729 N.E.2d 972 (Ind. 2000). Justice Boehm wrote the majority opinion, which Chief Justice Shepard joined. Justice Sullivan concurred in part and in result with a separate opinion. Justice Dickson wrote a dissenting opinion, in which Justice Rucker concurred. The court's decision affirmed the trial court's summary judgment in favor of the defendants. The Indiana Court of Appeals, in a 1997 opinion, also affirmed the trial court. See 682 N.E.2d 822 (Ind. Ct. App. 1997).

286. The court rendered its decision in *McIntosh* too recently to justify a full treatment in this Article. No doubt other commentators will provide extensive analysis of the decision in the coming year.

case because of its manifest importance to product liability practitioners and their clients. In light of *Martin*, the case seemed to acquire a broader significance in terms of its potential to shape Indiana constitutional scholarship.

The plaintiffs and their amici argued that the IPLA's statute of repose violated article 1, section 12 of the Indiana Constitution, often referred to as the "open courts" or "remedy by due course of law" provision. They also contended that the statute of repose violated article 1, section 23, often referred to as Indiana's "equal protection" clause.

In rejecting both challenges, the majority reaffirmed the basic right of the legislature to abrogate, as well as create, certain tort remedies. The twenty-six page majority opinion, drawing widely on Indiana precedent and considering the laws of many other states, represents a significant constitutional pronouncement in many respects, and may well limit in some ways *Martin's* overall impact.

CONCLUSION

As the foregoing cases reveal, the 1999 survey period was a significant one in terms of the continued development of a body of law interpreting and applying key terms found in the IPLA. Cases such as *Shebel*, *Butler*, *Marsh*, *Lenhardt Tool & Die Co.* and *Miceli* should help practitioners apply the IPLA's provisions. Similarly, the *Hopper*, *Cole*, and *Indianapolis Athletic Club, Inc.* decisions should lend guidance to practitioners who seek to apply some of the IPLA's defenses.

Moreover, although the decisions in *McIntosh*, *Noppert*, *Novicki*, and *Holmes* have helped to shape and refine Indiana product liability practice, they represent the tip of the iceberg in terms of the continued development of Indiana product liability law.²⁸⁷ Practitioners look to the new millennium with much anticipation for additional pronouncements from Indiana's courts and for unique and appropriate ways to apply the provisions of the IPLA.

287. For example, there are cases now working their way through the state and federal appellate systems that ultimately will determine the applicability of the ten-year statute of repose in asbestos personal injury cases. See, e.g., *Fulk v. ACandS, Inc.*, Court of Appeals Cause No. 45A04-0001-CV-008; *Black v. AlliedSignal, Inc.*, Court of Appeals Cause No. 45A04-9912-CV-565; *Poirer v. ACandS, Inc.*, Court of Appeals Cause No. 45A03-9910-CV-388; *Noppert v. Rapid-American Corp.*, Court of Appeals Cause No. 84A04-0005-CV-179; *Spriggs v. Owens Corning Fiberglas*, Seventh Circuit Cause No. 99-2464; *Spoonamore v. John Crane, Inc.*, Seventh Circuit Cause No. 99-2465), and who qualifies as a "bystander" for purposes of recovery under the IPLA (e.g., *Stegmoller v. ACandS, Inc.*, Trial Court Cause No. 49D02-9501-MI-001-107).

SURVEY OF THE LAW OF PROFESSIONAL RESPONSIBILITY

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Very often, an examination of the role of professional responsibility of lawyers takes the form of a recitation of the latest and most significant disciplinary actions from the state's highest court. During the period covered by this Article, a number of significant developments occurred that provide important guidance to practicing lawyers with regard to the standards of civility and professionalism expected of them in day-to-day practice. Moreover, many of these guideposts have appeared in the form of opinions about areas of substantive law rather than in opinions directly disciplining a member of the profession. In other words, the Indiana Supreme Court is taking a proactive approach to defining the roles of lawyers and the legal profession. This approach may be at odds with the common understanding of lawyers as zealous advocates within the legal system. The court's stated vision may be described as a required balancing of the lawyer's role as advocate, limited by the judicial system's duty to uncover the truth. Put another way, the practicing lawyer must recognize that enforceable duties are owed to third parties outside the attorney-client relationship.

On another front, the supreme court addressed a "hot button" topic among litigators during this survey period: the use of salaried in-house lawyers to defend insureds in claims against their policies. As several other states have done, the Indiana Supreme Court held that the attorney-employer relationship was not a per se conflict of interest or inherently problematic.¹ Further, the court refused to condemn the arrangement on ideological grounds and decided to examine every such allowed problem on a case-by-case basis.² As long as the relationship between the lawyer and the insurance carrier is made clear to the insured client, there is no ethical problem assumed at the outset of the relationship.³ Although dangers clearly exist, conscientious and ethical lawyers can avoid these shoals. The in-house lawyer must not, however, represent himself as somehow independent of the insurance carrier.⁴

I. CIVILITY AND PROFESSIONALISM IN THE SEVENTH CIRCUIT AND INDIANA

The Honorable Marvin E. Aspen, Chief Judge of the United States District Court for the Northern District of Illinois, dates the "modern" civility movement

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1. See *Cincinnati Ins. Co. v. Wills*, 717 N.E.2d 151 (Ind. 1999).

2. See *id.* at 155.

3. See *id.* at 160.

4. See *id.* at 165.

back at least to 1971.⁵ Judge Aspen chose this date because that was “when then-Chief Justice Warren Burger remarked that ‘overzealous advocates seem to think the zeal and effectiveness of a lawyer depends on how thoroughly he can disrupt the proceedings or how loud he can shout or how close he can come to insulting all those he encounters.’”⁶ In the Interim Report of the Committee on Civility of the Seventh Federal Judicial Circuit, the Committee defined civility as “professional conduct in litigation proceedings of judicial personnel and attorneys.”⁷ The Committee, however, “did not limit the term to good manners or social grace.”⁸ Monroe Freedman, a critic of the proponents for civility and professionalism in the legal profession, has noted the lack of a clear definition of the term “civility.”⁹ Monroe Freedman stated that:

Everyone is for civility and courtesy, but everyone is defining those terms differently. In a recent series of exchanges on the online service Lexis Counsel Connect, for example, definitions of incivility ranged from fraud and deceit to failure to return telephone calls. In between were: being a junkyard dog; being sneaky, mean, or misleading; not being ethical; failing to provide discovery; obstructing discovery; badgering witnesses; ignoring deadlines; being rude; and being a jerk. Obviously, “civility” means radically different things to different people.¹⁰

As Freedman notes, civility and professionalism are frequently discussed topics in the literature of today’s legal community.¹¹

5. Hon. Marvin E. Aspen, *A Response to the Civility Naysayers*, 28 STETSON L. REV. 253, 254 (1998) (Judge Aspen was appointed by President Carter to the United States Court for the Northern District of Illinois on July 24, 1979. On July 1, 1995, he was elevated to Chief Judge. Judge Aspen served as chair of the Committee on Civility of the Seventh Federal Judicial Circuit); see also Monroe Freedman, *Civility Runs Amok*, LEGAL TIMES, Aug. 14, 1995, at 54 (crediting a series of speeches by then Chief Justice Warren Burger with creating “[t]he push for civility, courtesy, and professionalism. . . in the early 1970’s”).

6. Aspen, *supra* note 5, at 254 (quoting Chief Justice Warren E. Burger, in *The Necessity for Civility*, 52 F.R.D. 211, 213 (1971)). Judge Aspen also notes: “Efforts toward civility in law, of course, date back much further.” *Id.* at 254 n.4. Further, Judge Aspen refers to a Nineteenth Century barrister’s thoughts on civility and Dean Roscoe Pound’s 1906 address to the American Bar Association. See *id.*; see also Freedman, *supra* note 5, at 54, paraphrasing then-Chief Justice Warren E. Burger’s comments in *The Necessity for Civility*, 52 F.R.D. 211 (1971).

7. *Interim Report of the Committee on Civility of the Seventh Federal Judicial Circuit*, 143 F.R.D. 371, 374 (1992).

8. *Id.*

9. Freedman, *supra* note 5, at 54.

10. *Id.*

11. See, e.g., Christopher W. Deering, *Candor Toward the Tribunal: Should An Attorney Sacrifice Truth and Integrity for the Sake of the Client?*, 31 SUFFOLK U. L. REV. 59 (1997); Daisy Hurst Floyd, *Candor Versus Advocacy: Courts’ Use of Sanctions to Enforce the Duty of Candor Toward the Tribunal*, 29 GA. L. REV. 1035 (1995); Austin Sarat, *Enactments of Professionalism:*

Members of the Indiana and Seventh Circuit courts have informally joined in this discussion through their participation in symposiums and by writing law review and bar journal articles.¹² In 1989, the Seventh Circuit formed a nine-member committee to determine whether a civility problem existed in the Seventh Circuit and, if so, to recommend what can be done about the problem.¹³ Indiana's judiciary and the Seventh Circuit's judiciary have not limited their discussion of the civility and professionalism problem to these more or less informal forums. The Seventh Circuit adopted the *Standards for Professional Conduct within the Seventh Federal Judicial Circuit*¹⁴ as a result of the findings of its Committee on Civility. Recently, Indiana courts have addressed the civility and professionalism issue in several cases. Members of the judiciary in the Seventh Circuit and Indiana state courts have expressed the view that a lack of

A Study of Judges' and Lawyers' Accounts of Ethics and Civility in Litigation, 67 FORDHAM L. REV. 809 (1998); Edward M. Waller, Jr., *Professionalism: The Client May Come Second*, 28 STETSON L. REV. 279 (1998); Kathleen P. Browe, Comment, *A Critique of the Civility Movement: Why Rambo Will Not Go Away*, 77 MARQ. L. REV. 751 (1994); Brenda Smith, Comment, *Civility Codes: The Newest Weapons in the "Civil" War over Proper Attorney Conduct Regulations Miss Their Mark*, 24 U. DAYTON L. REV. 151 (1998); Paul Lowell Haines, Note, *Restraining the Overly Zealous Advocate: Time for Judicial Intervention*, 65 IND. L.J. 445 (1990); Arthur Garwin, *Uncivil Temptations: Lawyers Who Indulge in Hardball Tactics Could Face Suspension, Fee Reduction or Other Penalties*, A.B.A. J., June 1999, at 81; Jerome J. Shestack, *Advancing Professionalism Needs Judicial Help*, A.B.A. J., Apr. 1998, at 8.

12. See, e.g., Aspen, *supra* note 5; Marvin E. Aspen, *The Search for Renewed Civility in Litigation*, 28 VAL. U. L. REV. 513 (1994) (this issue of the *Valparaiso University Law Review* was from symposium entitled *Professionalism in the Practice of Law: A Symposium on Civility and Judicial Ethics in the 1990s*); Brent E. Dickson & Julia Bunton Jackson, *Renewing Lawyer Civility*, 28 VAL. U. L. REV. 531 (1994) (from the same symposium issue of the *Valparaiso University Law Review*); Hon. Larry J. McKinney, *Some Thoughts on Civility and the Practice of Law*, 38 RES GESTAE, Apr. 1995, at 7; Justice Randall T. Shepard, *What Judges Can Do About Legal Professionalism*, 72 FLA. B.J., Mar. 1998, at 30. This list of law review and bar journal articles is by no means a complete list of the informal comment that the judges of the Seventh Circuit and the Indiana courts have made on the topic of civility and professionalism.

13. See Aspen, *supra* note 5, at 254. Three of the nine members of the Seventh Circuit's Committee on Civility were judges in the Seventh Circuit: Hon. Marvin E. Aspen, Chairman and U.S. District Judge, Northern District of Illinois; Hon. Larry J. McKinney, U.S. District Judge, Southern District of Indiana; and Hon. John C. Shabaz, U.S. District Judge, Western District of Wisconsin. The other members of the Seventh Circuit's Committee on Civility were lawyers in firms practicing in the Seventh Circuit's jurisdiction: William A. Montgomery from Schiff Hardin & Waite in Chicago, Illinois; David E. Beckwith from Foley & Ladner in Milwaukee, Wisconsin; George N. Leighton from Earl L. Neal & Associates in Chicago, Illinois; Bernard J. Nussbaum from Sonnenschein Nath & Rosenthal in Chicago, Illinois; Nancy Schaefer from Schaefer Resenwein & Fleming in Chicago, Illinois; and Stephen W. Terry, Jr. from Baker & Daniels in Indianapolis, Indiana.

14. *Final Report of the Committee on Civility of the Seventh Federal Judiciary Circuit*, 143 F.R.D. 441 (1992) [hereinafter *Seventh Circuit's Standards*].

civility and professionalism is currently a problem in the legal profession. These members believe part of their judicial duties is to advance the values of civility and professionalism in the legal community.

A. The Seventh Circuit's Standards

On December 14, 1992, the Seventh Circuit adopted the *Standards for Professional Conduct within the Seventh Federal Judicial Circuit* ("Seventh Circuit's Standards").¹⁵ The Seventh Circuit's Standards are the result of work done by a committee of lawyers and judges from the Seventh Circuit that investigated the issue of civility.¹⁶ The committee was formed in 1989 by then-Chief Judge William J. Bauer, who gave the committee the mandate to "determine whether there is a civility problem in litigation in the Seventh Circuit and, if so, what should be done about it."¹⁷ In its Final Report, the committee made the following recommendations:

1. The Proposed Standards for Professional Conduct within the Seventh Federal Judicial Circuit . . . should be adopted.
2. Each lawyer admitted to practice (or appearing pro hac vice) in any court in the Seventh Federal Judicial Circuit should receive a copy of the Standards for Professional Conduct. Each court within the Circuit should consider adoption of a local rule requiring each lawyer admitted to practice (or appearing pro hac vice) to certify, as a precondition to admission and to filing an appearance in any court within the Seventh Federal Judicial Circuit, that he or she has read and will abide by the Standards.
3. Civility training, including education regarding the Standards for Professional Conduct, should be implemented by public law offices, private law firms, and corporations with in-house counsel. This training should also be available at federal judicial workshops.
4. All lawyers and judges within the Seventh Federal Judicial Circuit should consider participation in civility, professionalism, or mentoring programs in professional legal associations and bar associations as well as participation in one of the American Inns of Court.
5. If a professional legal organization or bar association does not have a civility, professionalism, or mentoring program, or an American Inn of Court does not exist in a particular area, lawyers and judges should consider establishing such a program or an Inn of Court.

15. *Id.*

16. *See id.*

17. *Id.*; see also Aspen, *supra* note 5, at 254.

6. Law schools should encourage discussion of the Standards of Professional Conduct in the classroom and, especially, in clinical training programs, and should encourage discussion among faculty members.¹⁸

The Seventh Circuit's Standards, as adopted on December 14, 1992, contain a Preamble, a section on Lawyer's Duties to other Counsel, a section on Lawyer's Duties to the court, a section on the Court's Duties to Lawyers and a section on Judges' Duties to Each Other.¹⁹ Even though the Seventh Circuit's Standards specify certain types of conduct that are not acceptable in the legal community, these standards are not regulatory (i.e., not enforceable by a disciplinary body), but rather, these standards are aspirational. The Preamble provides, in part:

The following standards are designed to encourage us, judges and lawyers, to meet our obligations to each other, to litigants and to the system of justice, and thereby achieve the twin goals of civility and professionalism, both of which are hallmarks of a learned profession dedicated to public service.

We expect judges and lawyers will make a mutual and firm commitment to these standards. Voluntary adherence is expected as part of a commitment by all participants to improve the administration of justice throughout this Circuit.

These standards shall not be used as a basis for litigation or for sanctions or penalties. Nothing in these standards supersedes or detracts from existing disciplinary codes or alters existing standards of conduct against which lawyer negligence may be determined.²⁰

The first paragraph of the Preamble to the Seventh Circuit's Standards points out that lawyers' advocacy of clients is limited by their duties to the legal system:

A lawyer's conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms. In fulfilling our duty to represent a client vigorously as lawyers, we will be mindful of our obligations to the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful, and efficient manner.²¹

By adopting a voluntary and aspirational code of civility, the Seventh Circuit provides to lawyers a guide to the proper limits of advocacy within a system of justice that is a truth-seeking process. As an aspirational guide to the proper limits of advocacy in the legal system, these standards, however, do not mandate

18. *Seventh Circuit Standards*, 143 F.R.D. at 447.

19. *See id.* at 448-52.

20. *Id.* at 448.

21. *Id.*

an end to the incivility among the members of the legal profession. The Committee on Civility was aware that the Standards would not change the incivility among the members of the legal profession, and asserted that if change in the incivility of the bar "is to come, it must stem from the individual effort of each participant in the litigation process as part of a personal obligation assumed equally by lawyers and judges."²² In short, what is needed to bring and end to the incivility among the members of the bar is a matter of integrity and character, neither of which may be gained by a mere reading the Seventh Circuit's Standards. Improving one's character is an obligation that each member of the bar must do on his or her own, according to the Committee on Civility.²³ Accordingly, the Seventh Circuit's Standards are to act as a bench-mark to help each member of the bar to measure his or her own progress in this endeavor.

In 1998, however, the United States Court of Appeals in the Seventh Circuit criticized a lawyer, *Grun v. Pneumo Abex Corp.*,²⁴ for conduct that did not measure up to aspirational goals of the Seventh Circuit's Standards. The *Pneumo Abex* case involved a suit against a corporation brought by a former president of a corporate division alleging that the corporation breached a severance compensation agreement and a management incentive compensation plan.²⁵ The district court dismissed the former president's case against the corporation after neither party appeared for a trial date.²⁶ Neither party had received notice of this trial date.²⁷ After dismissing the case, the district court sent notice of the dismissal to the parties.²⁸ The corporation's lawyer received notice of the dismissal; however, the former president's lawyer did not receive notice of the dismissal. Eight months after the case had been dismissed, the former president's lawyer sent a change of address form to the corporation's lawyer. The corporation's lawyer chose not to inform the former president's lawyer that the case had been dismissed when the corporation's lawyer received the change of address form from her.²⁹

In a footnote, the Seventh Circuit Court criticized the decision of the corporation's lawyer "to remain silent when he admittedly knew that Grun [the former corporate president] was unaware of the dismissal order, *and* that neither party had received notice of the trial date."³⁰ The Seventh Circuit Court was offended that the corporation's lawyer admitted that he had researched whether he had a duty to inform the former president's lawyer of the dismissal notice and, when he found no such affirmative duty "in the rules, he chose to remain

22. *Id.* at 446.

23. *See id.*

24. 163 F.3d 411 (7th Cir. 1998).

25. *See id.* at 417-18.

26. *See id.* at 417.

27. *See id.*

28. *See id.* at 418.

29. *See id.*

30. *Id.* at 422 n.9.

silent.”³¹ The Seventh Circuit Court based its criticism of the corporation’s lawyer on the Rules of Professional Conduct for the Northern District of Illinois and the Seventh Circuit’s Standards.³² Local Rule 83.58.4(a)(5) of the Rules of Professional Conduct for the Northern District of Illinois prohibits an attorney from engaging in conduct that is prejudicial to the administration of justice.³³ Duty 18 in the section on Lawyers’ Duties to Other Counsel in the Seventh Circuit’s Standards provides: “We will not cause any default or dismissal to be entered without first notifying opposing counsel, when we know his or her identity.”³⁴

The Seventh Circuit recognized that the corporation’s lawyer “did not affirmatively ‘cause’ the case to be dismissed, but counsel was well aware that things were amiss and chose not to fix them even though doing so would have promoted the interest of fair play.”³⁵ Although the court recognized that the corporation’s lawyer had no affirmative duty to alert the former president’s lawyer of the dismissal, the Seventh Circuit Court criticized the corporation’s lawyer because “the spirit of the rules required such a result.”³⁶ Clearly, the Seventh Circuit Court seriously takes a lawyer’s duty to improve civility among the members of the bar and, by criticizing uncivil conduct by lawyers who appear before it, is willing to guide lawyers toward the aspirational goals of civility and professionalism.

B. Indiana Courts and Civility

Addressing a notice issue similar to that in *Pneumo Abex*, the Indiana Supreme Court in 1999 tackled the civility and professionalism problem in a case entitled *Smith v. Johnston*.³⁷ Like the *Pneumo Abex* case, the court in *Smith v. Johnston* looked deeper than the legal duties of lawyers as spelled out in the various codes and rules of professional conduct. The court noted:

The [Indiana Rules of Professional Conduct] are guidelines for lawyers and do not spell out every duty a lawyer owes to clients, the court, other members of the bar and the public. The preamble to the Rules is clear that “[t]he Rules, do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules.” Thus lawyers’ duties are found not only in the specific rules of conduct and rules of procedure, but also in courtesy, common sense and the constraints of our judicial system. As an officer of the Court, every lawyer must avoid

31. *Id.*

32. *See id.*

33. *See id.* (citing ILCS S. CT. PROF. CONDUCT Rule 8.4, providing “[a] lawyer shall not . . . engage in conduct that is prejudicial to the administration of justice.”).

34. *Seventh Circuit’s Standards*, 143 F.R.D. 441, 450 (1992).

35. *Grun*, 163 F.3d at 422 n.9.

36. *Id.*

37. 711 N.E.2d 1259 (Ind. 1999).

compromising the integrity of his or her own reputation and that of the legal process itself.³⁸

To put it another way, lawyers, according to the *Smith v. Johnston* court, are more than mere advocates, zealously representing their clients; lawyers are officers of the court and owe a duty to the integrity of the "legal process itself."³⁹ This duty to the integrity of the legal process, according to *Smith v. Johnston*, is based partially on the specific rules governing procedure and lawyer conduct; however, this duty is also based partially on amorphous ethical norms that the court called "courtesy, common sense and the constraints of the judicial system."⁴⁰

Before looking at the *Smith v. Johnston* analysis in detail, this section will contain an analysis of the development of civility and professionalism in the Indiana judicial system. First, this section will review an early Indiana Supreme Court case entitled *Pittsburgh, C., C. & St. L. Railway Co. v. Muncie & Portland Traction Co.*,⁴¹ addressing the issue of what is the appropriate level of advocacy for a lawyer. Second, this section will address the issue of lawyer incivility in appellate briefs. Finally, it will examine a few Indiana cases in which the Indiana Supreme Court has initiated a discussion on the proper limits that should be placed on a lawyer in the course of his or her advocacy for a client, returning to *Smith v. Johnston*.

1. *An Early Case.*—In 1906, the Indiana Supreme Court addressed the issue of a lawyer's use of language in an appellate brief that was "discourteous" in a case styled as *Pittsburgh, C., C. & St. L. Railway Co. v. Muncie & Portland Traction Co.*⁴² This case involved a railroad company's action to enjoin the construction of a grade crossing over a railroad.⁴³ The construction company filed a cross-complaint to enjoin the railroad company from interfering with the construction of the grade crossing.⁴⁴ The trial court found in favor of the construction company and granted an injunction against the railroad company. The railroad company appealed and filed its brief in support of its appeal.⁴⁵ The brief was 142 pages long and included language the court considered improper.⁴⁶ The court quoted the following passage from the railroad company's brief:

But the court, instead of granting appellant relief, has concluded and decreed that the operation of appellant's railroad is subservient to the rights of appellee, and that appellee [the construction company] may tear up and destroy its railroad, and obstruct and prevent appellant's

38. *Id.* at 1263-64 (quoting IND. PROFESSIONAL CONDUCT preamble).

39. *Id.* at 1264.

40. *Id.*

41. 77 N.E. 941 (Ind. 1906).

42. *Id.*

43. *See id.*

44. *See id.*

45. *See id.*

46. *See id.*

operation thereof, and appellant is enjoined from interfering with whatever appellee may do or desire to do. A more outrageous decree never disgraced the record of any court.⁴⁷

The court in *Muncie & Portland Traction Co.* ordered the railroad company's brief to be stricken.⁴⁸ The *Muncie & Portland Traction Co.* court referred to lawyers as "officers of the court" and "assistants in the administration of justice."⁴⁹ Anticipating language of the proponents of "modern civility," the court in *Muncie & Portland Traction Co.* reasoned:

[T]he purpose of a brief is to present to the court in concise form the points and questions in controversy, and by fair argument on the facts and law of the case to assist the court in arriving at a just and proper conclusion. A brief in no case can be used as a vehicle for the conveyance of hatred, contempt, insult, disrespect, or *professional discourtesy* of any nature for the court of review, trial judge, or opposing counsel. Invectives are not argument, and have no place in legal discussion, but tend only to produce prejudice and discord. The language referred to is offensive, impertinent, and scandalous.⁵⁰

The *Muncie & Portland Traction Co.* court draws a distinction between what is proper advocacy in an appellate brief and what is improper (i.e., professional discourtesy). The *Muncie & Portland Traction Co.* court concludes that argument on the facts and law of a particular case is proper advocacy, but invectives have no place in legal discussion.⁵¹

2. *Incivility in Appellate Briefs.*—In the 1990s, the Indiana courts have addressed the issue of incivility in the legal profession in several cases involving lawyers' duties to the integrity of the legal profession while representing a client in a civil case. The significance of these cases is that the Indiana courts have begun to make a distinction between proper and effective advocacy within the limits of professionalism and civility and zealous advocacy (which the Indiana courts have often found ineffective) without limits. Several of these cases, like the *Muncie & Portland Traction Co.* case, look at the issue of lawyer civility in appellate briefs.⁵²

In 1991, the Indiana Court of Appeals addressed an example of incivility in an appellate brief in *Clark v. Clark*.⁵³ The *Clark* case involved an appeal by the

47. *Id.*

48. *See id.* at 942.

49. *Id.* at 941.

50. *Id.* at 942 (emphasis added).

51. *See id.*

52. *See B & L Appliances & Servs., Inc. v. McFerran*, 712 N.E.2d 1033 (Ind. Ct. App. 1999); *Bloomington Hosp. v. Stofko*, 709 N.E.2d 1078 (Ind. Ct. App. 1999); *WorldCom Network Servs., Inc. v. Thompson*, 698 N.E.2d 1233 (Ind. Ct. App. 1998); *Amax Coal Co. v. Adams*, 597 N.E.2d 350 (Ind. Ct. App. 1992); *Clark v. Clark*, 578 N.E.2d 747 (Ind. Ct. App. 1991).

53. *Clark*, 578 N.E.2d at 747.

wife from the trial court's property settlement in a divorce.⁵⁴ The appellate court noted that the lawyer for the wife had used "intemperate language" in the wife's brief.⁵⁵ The *Clark* court refused to repeat the intemperate language from the brief written by the wife's lawyer.⁵⁶ Referring to the *Muncie & Portland Traction Co.* case, the *Clark* court noted that they had the power to order the brief stricken for the use of intemperate language by the wife's lawyer.⁵⁷ However, the *Clark* court did not exercise this right, primarily because they did not want to deny the wife her day in court.⁵⁸ Instead, the *Clark* court chastised the wife's lawyer, quoting extensively from *Muncie & Portland Traction Co.* to edify the wife's lawyer about the reasons why she should not have used intemperate language in her brief to the appellate court.⁵⁹

Like the *Muncie & Portland Traction Co.* court, the *Clark* court focused on the practical aspect of using intemperate language in a brief to the appellate courts. In other words, the *Clark* court focused on the fact that the use of intemperate language may be counter-productive to the goals of the lawyer's client and may be ineffective advocacy on the part of the lawyer.⁶⁰ Thus, the *Clark* court found a limit to zealous advocacy when the zealousness by the lawyer becomes ineffective.

In 1992, the Indiana Court of Appeals again reviewed a case involving ad hominem attacks on the opposing lawyer in appellate briefs in a case entitled *Amax Coal Co. v. Adams*.⁶¹ In this case, homeowners who lived near the mines sued a coal mining owner for damage to their homes caused by the blasting operations at the mines.⁶² After the coal mining owner answered the complaint of the homeowners, the homeowners filed interrogatories and requests for production, broadly asking for "all facts" and all documents "supporting" or "relating to" the denials and affirmative defenses of the coal mining owner.⁶³ The trial court overruled the coal mining owner's objection to these discovery requests.⁶⁴ The coal mining owner sought an interlocutory appeal from this adverse ruling. Before addressing the merits of the appeal, the *Amax Coal Co.* court, sua sponte, raised the issue "whether cross-condemnation by each briefing counsel of their opposing counsels' off-record conduct, motivation, and supposed bad manners in the conduct of discovery, is appropriate material for appellate

54. *See id.*

55. *Id.* at 748.

56. *See id.*

57. *See id.*

58. *See id.* at 749. Note, the *Clark* court actually affirmed the decision of the trial court on the merits of the case. *See id.* at 751.

59. *See id.* at 748-49.

60. *See id.* at 749.

61. 597 N.E.2d 350 (Ind. Ct. App. 1992).

62. *See id.* at 351.

63. *Id.* at 351-52.

64. *See id.* at 352.

briefs.”⁶⁵ The *Amax Coal Co.* court noted that the lawyers for each side had taken the opportunity in their respective briefs to attack each other’s “intellectual skills, motivations, and supposed violations of the rules of common courtesy.”⁶⁶ The *Amax Coal Co.* court condemned the practice of using appellate briefs to attack the lawyer of the opposing party.⁶⁷ The *Amax Coal Co.* court pointed out that the practice of using appellate briefs to attack the lawyer of the opposing party is a waste of judicial time, tends to take away from the appropriate arguments for the merits of the case, and violates the intent and purpose of the appellate rules.⁶⁸ In its own language, the *Amax Coal Co.* court puts it as follows:

[T]he judiciary . . . has absolutely no interest in internecine battles over social etiquette or the unprofessional personality clashes which frequently occur among opposing counsel these days. Irrelevant commentary thereon during the course of judicial proceedings does nothing but waste valuable judicial time. On appeal, it generates a voluminous number of useless briefing pages which have nothing to do with the issues presented, as in this appeal.

Further, appellate counsel should realize, such petulant grouching has a deleterious effect on the appropriate commentary in such a brief. Material of this nature is akin to static on a radio broadcast. It tends to blot out legitimate argument.

On a darker note, if such commentary in appellate briefs is actually directed to opposing counsel for the purpose of sticking hyperbolic barbs into his or her opposing numbers’ psyche, the offending practitioner is clearly violating the intent and purpose of the appellate rules. In sum, we condemn the practice, and firmly request the elimination of such surplusage from future appellate briefs.⁶⁹

Through this language, the *Amex Coal Co.* court hoped to address an incivility problem the court perceives it is seeing “with ever-increasing frequency.”⁷⁰ Like the *Clark* court, the *Amex Coal Co.* court found ad hominem attacks on the opposing lawyer to be ineffective advocacy and, therefore, places a limit on the lawyer as a zealous advocate for his or her client.

Another case involving incivility in appellate briefs is *WorldCom Network Services, Inc. v. Thompson*,⁷¹ decided by the Indiana Court of Appeals in 1998. The *WorldCom* case involved a dispute between a telecommunications company

65. *Id.* at 351.

66. *Id.* at 352.

67. *See id.*

68. *See id.*

69. *Id.* (citations omitted).

70. *Id.*

71. 698 N.E.2d 1233 (Ind. Ct. App. 1998).

and landowners over cables buried on the landowners' property.⁷² The telecommunications company had buried cables on the landowners' property without the landowners' consent.⁷³ The landowners objected to the installation of the cables on their property.⁷⁴ The telecommunications company filed an action seeking a preliminary injunction to prohibit the landowners from disturbing the cables.⁷⁵ The trial court denied the telecommunications company's request for a preliminary injunction. The telecommunications company took an interlocutory appeal, and the appellate court entered a stay pending appeal.⁷⁶ The appeal terminated and the case was remanded to the trial court to consider additional evidence.⁷⁷ After the appeal terminated, but before the next hearing, the landowners severed the cables.⁷⁸ On remand, the trial court confirmed the initial order.⁷⁹ The telecommunications company brought a second interlocutory appeal, and the appellate court issued a memorandum opinion.⁸⁰ The landowners petitioned for rehearing.⁸¹

According to the *WorldCom* court, the lawyers for the landowners passed the limits of "vigorous advocacy" in their representation during the rehearing.⁸² The *WorldCom* court noted:

While the Thompsons [landowners] profess to hold this court in "high esteem," significant parts of their petition and brief are condescending and permeated with sarcasm and disrespect. By way of illustration, they allege that our decision, if not corrected, "can only lead to ridicule, if not contempt, for this Court by the Thompsons and their many friends and neighbors," and that "[t]oo many citizens are already cynical, if not contemptuous, of the judiciary." They assert that our decision contains "glaringly incorrect statements of supposed fact" which are "obviously wrong." They imply that the court lacks experience in real estate matters.

The Thompsons also accuse the court of writing "with pens filled with the staining ink of innuendo," allege that portions of our decision give "the appearance of bias, prejudice and impropriety" and argue that "the decision will remain as a blemish on the record" of the court if those portions are not retracted. They assert that if this court were to

72. *See id.* at 1235.

73. *See id.*

74. *See id.*

75. *See id.*

76. *See id.* at 1235-36.

77. *See id.* at 1236.

78. *See id.* at 1236 n.1.

79. *See id.* at 1236.

80. *See id.*

81. *See id.* at 1235.

82. *Id.* at 1236.

disagree with a certain finding "it would be ridiculous," and they question the court's good faith and ethics. They demand an "apology" from the court. At one point, in rhetorical high gear, the Thompsons warn the court against reaching a particular conclusion and declare that such a ruling would be "blatantly erroneous."⁸³

The *WorldCom* court, however, did not strike the landowners' entire brief. Instead, the *WorldCom* court decided to only strike the "inappropriate portions" and admonished the landowners' lawyers "that the use of impertinent material disserves the client's interest and demeans the legal profession."⁸⁴ The *WorldCom* court did not strike the landowners' whole brief because the court did not believe that the landowners should be denied consideration of their appeal on the merits "due to the excessive zeal of their attorneys."⁸⁵ The *WorldCom* decision serves to warn lawyers that an attack on the court from which a lawyer is seeking a remedy is not effective advocacy; instead, it is ineffective zealotry.

Like the *WorldCom* case, two 1999 Indiana Court of Appeals cases, *Bloomington Hospital v. Stofko*⁸⁶ and *B & L Appliances & Services, Inc. v. McFerran*⁸⁷ involve lawyer incivility directed toward the appellate court. In the *Bloomington Hospital* case, the court of appeal's opinion is referred to as "incomprehensible" in a petition for rehearing.⁸⁸ In *Bloomington Hospital*, the employer requested that the court of appeals to reconsider its decision.⁸⁹ In the employer's brief the lawyer for the employer called the court of appeals decision "incomprehensible."⁹⁰ The *Bloomington Hospital* court affirmed its previous decision and in a footnote cautioned the employer's lawyer that "referring to an opinion as 'incomprehensible' when seeking reconsideration from the very judges who issued the opinion is unpersuasive and ill-advised."⁹¹

Similarly, the court of appeal's decision in the *B & L Appliance* case is referred to as a "bad lawyer joke" in a petition for rehearing.⁹² In this case, a pedestrian fell on a sidewalk in front of a building.⁹³ The pedestrian filed suit against the owner of the building and a business leasing part of the building. After the complaint was filed, the lawyer for the pedestrian made the following promises to the business and the building owner by way of a letter to their respective insurance companies:

83. *Id.*

84. *Id.* at 1237.

85. *Id.*

86. 709 N.E.2d 1078 (Ind. Ct. App. 1999).

87. 712 N.E.2d 1033 (Ind. Ct. App. 1999).

88. *Bloomington Hospital*, 709 N.E.2d at 1078.

89. *See id.*

90. *Id.*

91. *Id.* at 1079 n.1 (citing *WorldCom Network Servs., Inc. v. Thompson*, 698 N.E.2d 1233, 1236 n.2 (Ind. Ct. App. 1998)).

92. *B & L Appliance*, 712 N.E.2d at 1037.

93. *See id.* at 1035.

Moreover, my clients have authorized me to instruct each of the carriers that we will not attempt to obtain a default judgment against your insureds. We pledge to both carriers that if this matter cannot be resolved between the parties, that we will give each of you written notice that answers should be filed (we will give you a minimum 30 [sic] window to hire counsel after our written notification to you).⁹⁴

After settlement negotiations broke down, the lawyer for the pedestrian sent a second letter to the insurance companies for the business and the building owner.⁹⁵ The second letter stated in pertinent part:

Please allow this letter to serve as written notice to you that we are prepared to go forward with the lawsuit. If no serious offers are going to be made, then we would expect answers to our complaint for damages to be filed within thirty days of this letter.⁹⁶

The day after the building owner received the letter, a lawyer entered an appearance on behalf of the building owner.⁹⁷ Almost three months after the lawyer for the pedestrian sent the second letter notifying the business and the building owner of the pedestrian's intention to proceed with the lawsuit, the lawyer for the pedestrian filed a motion for default judgment against the business, which the trial court granted the day after it was filed.⁹⁸ The next day, a lawyer for the business entered an appearance, and an answer was filed shortly thereafter. About two weeks after the trial court entered the default judgment against the business, the lawyers for the business filed a motion for relief from judgment, which the trial court denied.⁹⁹ The lawyers for the business then filed a "Motion to Enforce Plaintiffs' Agreement Not to Seek Default and for the Court to Reconsider Order Denying Defendant, B & L's [the business's] Motion for Relief from Judgment," which the trial court denied.¹⁰⁰ The business appealed the trial court's denial of its motion to set aside the default judgment, and the court of appeals affirmed the trial court's decision.¹⁰¹ Then, the business petitioned the court of appeals for rehearing, "insisting that [its] decision 'omits and ignores' an agreement between the parties and is contrary to law."¹⁰² In the petition for rehearing, the lawyers for the business characterized the appellate court's ruling as a "bad lawyer joke."¹⁰³ The *B & L Appliances* court quoted the business's argument attacking the integrity of the court:

94. *Id.*

95. *See id.*

96. *Id.*

97. *See id.*

98. *See id.*

99. *See id.*

100. *Id.*

101. *See id.*

102. *Id.*

103. *Id.*

III. SADLY, THE RAMIFICATIONS OF THE COURT'S DECISION READS [sic] LIKE A BAD LAWYER JOKE . . . "WHEN IS IT OKAY FOR A LAWYER TO LIE? WHEN HIS LIPS ARE MOVING TO AN INSURANCE ADJUSTER."

This Court's opinion *continues* the perception that was discussed extensively in the *Indiana Lawyer*, March 3-16, 1999, where the legal profession is attempting a public relations campaign concerning the public's perception of lawyers. The *Indiana Lawyer* discussed the American Bar Association's study that said the public's perception is lawyers are more concerned with their own interests than the public's or their client's and expressed a concern to stop the cocktail party jokes or mute the motion picture stereotypes that paint the legal profession as greedy and ruthless.

The Court's opinion does nothing more than fuel these perceptions. It is a widely held belief by the general public that lawyers lie and the Court's [sic] protect them. This Court cannot ignore McFerrans' [the pedestrian's] lawyer lied to Bruce Kotek [the insurance agent for the business], when he promised not to seek a default, communicated both orally and in writing, and then later filed a default. The breaking of a promise is a lie and the essence of the Court's holding is that it is acceptable for a lawyer to lie to an insurance adjuster.

The Trial Court abused its' [sic] discretion in not enforcing McFerrans' [the pedestrian's] promise not to seek a default. This Court *could have advanced lawyer accountability* in communications by finding the Trial Court abused its' [sic] discretion in not enforcing McFerrans' [the pedestrian's] lawyer's promise and further, by stating the failure to enforce a lawyer's promise not to seek a default constitutes an abuse of discretion and holding that attorney misrepresentations or lying would not be tolerated.¹⁰⁴

In response to this strongly worded attack on the integrity of the court, the *B & L* court held that this language was intemperate and struck this entire section of the business's Petition for Rehearing.¹⁰⁵ Moreover, the *B & L* court admonished the business's lawyer for his "impertinent arguments" as a "disservice to his client and demeaning to the judiciary and the legal profession."¹⁰⁶ In a footnote, the *B & L* court cautioned the business's lawyer that referring to the appellate court's opinion in a petition for rehearing to the same judges who issued the opinion as a "bad lawyer joke" is "unpersuasive and ill-advised."¹⁰⁷ The *B & L* court acknowledged that it is appropriate for lawyers to seek reconsideration of a court's decision "when warranted to zealously represent the interests of

104. *Id.* 1037 (quoting from the Appellant's Pet. for Reh'g at 4).

105. *See id.* at 1038.

106. *Id.*

107. *Id.* at 1037 n.2 (citing *Bloomington Hosp. v. Stofko*, 709 N.E.2d 1078, 1079 n.1 (Ind. Ct. App. 1999)).

clients.”¹⁰⁸ The *B & L* court, however, warned attorneys that “in framing arguments in support of rehearing or reconsideration, counsel are obliged to maintain a respectful bearing towards this court.”¹⁰⁹

It is interesting that the reason the lawyer attacked the integrity of the court is because he believed that the lawyer for the pedestrian acted in an unprofessional manner, i.e., lied to the business in order to obtain a default judgment against the business. However, the *B & L* court was not persuaded that the pedestrian’s lawyer lied to the business to gain an advantage.¹¹⁰ The *B & L* court allowed the business’s lawyer to make this argument as a proper factual argument for a zealous advocate within the proper bounds of advocacy. However, the *B & L* court did not agree with the interpretation of the facts held by the business’s lawyer.¹¹¹

Although a factual argument over whether the opposing lawyer lied to gain an advantage may be proper advocacy, the *B & L* court rejected the notion that an attack on the integrity of the court can ever be proper advocacy.¹¹² To support its position that intemperate language in a brief is improper advocacy, the *B & L* court referred to the *Muncie & Portland Traction*¹¹³ case, the *WorldCom*¹¹⁴ case, and the *Clark*¹¹⁵ case. The *B & L* court directed the business’s lawyer to the advice in the *WorldCom* case and the *Muncie & Portland Traction* case regarding proper advocacy in an appellate brief based on factual and legal argument and not “righteous indignation” or “invectives.”¹¹⁶

108. *Id.*

109. *Id.*

110. *See id.* at 1036.

111. *See id.*

112. *See id.*

113. *Pittsburgh, C., C. & St. L. Ry. Co. v. Muncie & Portland Traction Co.*, 77 N.E. 941 (Ind. 1906).

114. *WorldCom Network Servs., Inc. v. Thompson*, 698 N.E.2d 1233 (Ind. Ct. App. 1998).

115. *Clark v. Clark*, 578 N.E.2d 747 (Ind. Ct. App. 1991).

116. *B & L Appliances*, 712 N.E.2d at 1038. The *B & L* court took the following quote from the *WorldCom* case:

[O]verheated rhetoric is unpersuasive and ill-advised. Righteous indignation is no substitute for a well-reasoned argument. We remind counsel that an advocate can present his cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

Id. (quoting *WorldCom*, 698 N.E.2d at 1236-37). The *B & L* court took the following quote from the *Muncie & Portland Traction* case:

Counsel has need of learning the ethics of his profession anew, if he believes that vituperation and scurrilous insinuation are useful to him or his client in presenting his case. The mind, conscious of its own integrity, does not respond readily to the goad of insolent, offensive, and impertinent language. It must be made plain that the purpose of a brief is to present to the court in concise form the points and questions in controversy, and by fair argument on the facts and law of the case to assist the court in arriving at a just and proper conclusion. A brief in no case can be used as a vehicle for

Like the other cases in this section suggested, the *B & L* case stands for the proposition that proper advocacy does not necessarily create a conflict with lawyers' duties to uphold the integrity of the legal process. In other words, it is possible that the most effective lawyers may be advocates for their clients and still not exceed the proper limits to zealous advocacy, i.e., attacks on the opposing party, the opposing party's lawyer, trial courts, or appellate courts.

3. *Supreme Court Limits on Advocacy*.—In this section, this Article will examine two recent Indiana Supreme Court cases in which the Indiana Supreme Court set limits on zealous advocacy among the members of the Indiana bar. The first case is *Fire Insurance Exchange v. Bell*,¹¹⁷ which addressed the ethical issue of whether a lawyer may make representations to the opposing lawyer during the course of settlement negotiations that are not trustworthy (i.e., misrepresentations). The second case is *Smith v. Johnston*,¹¹⁸ in which the Indiana Supreme Court went beyond the ethical question in *Fire Insurance Exchange* and looked at the ethical issue of whether a lawyer who complied with the letter of the law has ethical obligations to the opposing lawyer.

In 1994, Justice Dickson wrote the opinion for the Indiana Supreme Court in the *Fire Insurance Exchange* case.¹¹⁹ Justice Dickson framed the legal issue in the *Fire Ins. Exchange* case as "whether, and to what extent, a party who is represented by counsel has the right to rely on a representation of opposing counsel during settlement negotiations."¹²⁰ The *Fire Insurance Exchange* case involved a sixteen-month-old child who was severely burned in a fire at his grandfather's home.¹²¹ The fire was caused by a gasoline leak in the utility room, which was ignited by a water heater. The fire department cited the grandfather for his careless storage of gasoline.¹²² After the child suffered the injuries, the child's mother hired a lawyer to represent her son. The child's lawyer entered into settlement negotiations with the insurance agent and the insurance company's lawyer.¹²³ During these settlement negotiations, the insurance agent and the insurance company's lawyer informed the child's lawyer that the policy limit for the homeowner's insurance of the grandfather was \$100,000.¹²⁴ Contrary to these representations, the policy limit for the homeowner's insurance of the grandfather was actually \$300,000. The insurance company's lawyer

the conveyance of hatred, contempt, insult, disrespect, or professional discourtesy of any nature for the court of review, trial judge, or opposing counsel. Invectives are not argument, and have no place in legal discussion, but tend only to produce prejudice and discord.

Id. (quoting *Muncie & Portland Traction Co.*, 77 N.E. at 941-42).

117. 643 N.E.2d 310 (Ind. 1994).

118. 711 N.E.2d 1259 (Ind. 1999).

119. See 643 N.E.2d at 311.

120. *Id.*

121. See *id.*

122. See *id.*

123. See *id.*

124. See *id.*

knew the policy limit was \$300,000 when he made the misrepresentation to the child's lawyer.¹²⁵ After the child's condition stabilized, the insurance agent and the insurance company's lawyer each informed the child's lawyer that the insurance company would pay the \$100,000 policy limit. The child's lawyer advised the child's mother to settle, which she did.¹²⁶

Later, the child's lawyer filed a products liability suit against the manufacturer of the water heater on behalf of the child.¹²⁷ During settlement negotiations with the water heater manufacturer, the child's lawyer learned for the first time that the policy limits for the homeowner's insurance of the grandfather was \$300,000. After learning of the misrepresentation by the insurance agent and the insurance company's lawyer, the child's mother filed a suit against the insurance company, the insurance company's lawyer, and his law firm, alleging that the insurance company, its lawyer, and his law firm fraudulently misrepresented the policy limits of the homeowner's insurance of the grandfather.¹²⁸

In response to this complaint filed by the child's mother, the insurance company, the insurance company's lawyer, and his law firm filed a motion for summary judgment, contending they were entitled to summary judgment because the child's lawyer had no right to rely on the alleged misrepresentations of the insurance company's lawyer as a matter of law.¹²⁹ A component of the reliance element required to prove fraud is the right of the child's lawyer to rely on the alleged misrepresentations of the insurance company and its lawyer.¹³⁰ The insurance company's lawyer argued that the child's lawyer "had, as a matter of law, no right to rely on the alleged misrepresentations because he was a trained professional involved in adversarial settlement negotiation and had access to the relevant facts."¹³¹ The trial court denied the motions for summary judgment, finding that the issue whether the child's lawyer had a right to rely on alleged misrepresentations regarding the policy limits is a question for the fact-finder.¹³² This decision was certified for an interlocutory appeal, and the court of appeals affirmed the decision of the trial court.¹³³ The Indiana Supreme Court agreed with the analysis of the court of appeals and its conclusion, with respect to the claims against the insurance company, that whether the child's lawyer had a right to rely on the alleged misrepresentations of the insurance company is a question of fact for the jury to decide.¹³⁴

125. *See id.*

126. *See id.*

127. *See id.*

128. *See id.* at 311-12.

129. *See id.* at 312.

130. *See id.*

131. *Id.*

132. *See id.* at 311.

133. *See id.*; *Fire Ins. Exchange v. Bell*, 634 N.E.2d 517 (Ind. Ct. App. 1994), *aff'd*, 643 N.E.2d at 310.

134. *See Fire Ins. Exchange*, 643 N.E.2d at 312.

However, with respect to the insurance company's lawyer and his law firm, the Indiana Supreme Court disagreed and "grant[ed] transfer to recognize a separate and more demanding standard."¹³⁵ Specifically, the court in *Fire Insurance Exchange* held that the child's lawyer had a right to rely on any material misrepresentations that may have been made by the insurance company's lawyer.¹³⁶ Further, the court held that the right of child's lawyer to rely on these alleged material misrepresentations was "established as a matter of law."¹³⁷ In concluding their argument, the court declined,

to require attorneys to burden unnecessarily the courts and litigation process with discovery to verify the truthfulness of material representations made by opposing counsel. The reliability of lawyers' representations is an integral component of the fair and efficient administration of justice. The law should promote lawyers' care in making statements that are accurate and trustworthy and should foster the reliance upon such statements by others.¹³⁸

Clearly, the Indiana Supreme Court took the position that lawyers as advocates in the legal process must temper their zealous representation of their clients by making statements that are accurate and trustworthy. Thus, the court in *Fire Insurance Exchange* limited zealous advocacy by a lawyer's duty to be truthful. In other words, the proper advocate's zealous representation should be tempered by his or her duty to make truthful statements to others.

As a basis for holding a lawyer to this more demanding standard, the Indiana Supreme Court in *Fire Insurance Exchange*, first looked to its constitutional duty with respect to the supervision of the practice of law.¹³⁹ Relying on this constitutional duty, the Indiana Supreme Court reasoned that lawyers should be held to a more demanding standard because of a "particular expectation" that their representations will be honest and trustworthy.¹⁴⁰ In addition, the court stated: "The reliability and trustworthiness of attorney representations constitute an important component of the efficient administration of justice. A lawyer's representations have long been accorded a particular expectation of honesty and trustworthiness."¹⁴¹ Although the court does not explicitly refer to it, the language in the above statement echoes the language in Indiana Rule of Professional Conduct 8.4(d), which provides "[i]t is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of

135. *Id.*

136. *See id.* at 313.

137. *Id.* \

138. *Id.*

139. *See id.* at 312 (citing IND. CONST. art. VII, § 4, which provides, "The Supreme Court jurisdiction except in admission to the practice of law; discipline or disbarment of those admitted; the unauthorized practice of law; discipline, removal, and retirement of justices and judges . . .").

140. *Id.*

141. *Id.*

justice.”¹⁴² Despite this language, the Indiana Supreme Court has a more direct nexus with the Indiana Rules of Professional Conduct for their expectation of honesty and trustworthiness from lawyers. Furthermore, the court specifically looked to Indiana Rule of Professional Conduct 8.4(c), as an embodiment of the expectation of honesty and trustworthiness for lawyers.¹⁴³ Indiana Rule of Professional Conduct 8.4(c) prohibits lawyers from engaging in “conduct involving dishonesty, fraud, deceit or misrepresentations.”¹⁴⁴ Although Indiana Rule of Professional Conduct 4.1 also supports the court’s position that lawyers are expected to be honest and trustworthy, the court did not include this rule in its reasoning. Indiana Rule of Professional Conduct 4.1 provides, “[i]n the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person”¹⁴⁵

Despite the support that Indiana Rule of Professional Conduct 8.4(c) and 4.1 give to the court’s position, the court does not use the Indiana Rules of Professional Conduct as the sole basis of its more demanding standard. Instead, the court in *Fire Insurance Exchange* also found support for its position in the Indiana Oath of Attorneys,¹⁴⁶ the Standards for Professional Conduct within the

142. IND. PROF. COND. R. 8.4(d). By using language that echoes Rule 8.4(d), the supreme court may be foreshadowing the use of Rule 8.4(d) in *Smith v. Johnston*, 711 N.E.2d 1259 (Ind. 1999). In *Smith v. Johnston*, the Indiana Supreme Court bootstraps ethical norms into the legal duties of lawyers by saying a breach of these ethical norms is prejudicial to the administration of justice. See *id.* at 1263-64.

143. See *Fire Ins. Exchange*, 643 N.E.2d at 312.

144. IND. PROF. COND. R. 8.4(c).

145. *Id.* at R. 4.1.

146. IND. ADMISSION AND DISCIPLINE Rule 22. The Indiana *Oath of Attorneys* provides: Upon being admitted to practice law in the state of Indiana, each applicant shall take and subscribe to the following oath or affirmation:

“I do solemnly swear or affirm that: I will support the Constitution of the United States and the Constitution of the State of Indiana; I will maintain the respect due to courts of justice and judicial officers; I will not counsel or maintain any action, proceeding, or defense which shall appear to me to be unjust, but this obligation shall not prevent me from defending a person charged with crime in any case; I will employ for the purpose of maintaining the causes confided to me, such means only as are consistent with truth, and never seek to mislead the court or jury by any artifice or false statement of fact or law; I will maintain the confidence and preserve inviolate the secrets of my client at every peril to myself; I will abstain from offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged; I will not encourage either the commencement or the continuance of any action or proceeding from any motive of passion or interest; I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed; so help me God.”

Seventh Federal Judicial Circuit,¹⁴⁷ and the Indianapolis Bar Association's *Tenets of Professional Courtesy*.¹⁴⁸ As the court puts it, "[c]ommitment to these values [of honesty and trustworthiness] begins with the oath taken by every Indiana lawyer; it is formally embodied in rules of professional conduct, the violation of which may result in the imposition of severe sanctions; and it is repeatedly emphasized and reinforced by professional associations and organizations."¹⁴⁹ To support this statement, the court in *Fire Insurance Exchange* quoted a part of the Indiana Oath of Attorneys in which the lawyer promises to employ "such means only as are consistent with the truth."¹⁵⁰ Then, the court quoted the Preamble of the Seventh Circuit's Standards:

A lawyer's conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms. In

147. *Seventh Circuit's Standards*, 143 F.R.D. 441 (1992).

148. *Fire Ins. Exchange*, 643 N.E.2d at 313. The court quoted the entire text of the *Tenets of Professional Courtesy*:

The Tenets of Professional Courtesy adopted by the Indianapolis Bar Association in 1989 provide:

In order to promote a high level of professional courtesy and improve the professional relationships among members of the Indianapolis Bar Association, the Board of Managers of the Association adopts the following Tenets of Professional Courtesy.

I
In all professional activity, a lawyer should maintain a cordial and respectful demeanor and should be guided by a fundamental sense of integrity and fair play.

II
A lawyer should never knowingly deceive another lawyer or the court.

III
A lawyer should honor promises or commitments to other lawyers and to the court, and should always act pursuant to the maxim, 'My word is my bond.'

IV
A lawyer should make all reasonable efforts to schedule matters with opposing counsel by agreement.

V
A lawyer should make all reasonable efforts to reach informal agreement on preliminary and procedural matters.

VI
A lawyer should not abuse the judicial process by pursuing or opposing discovery arbitrarily or for the purpose of harassment or undue delay.

VII
A lawyer should always be punctual in communications with others and in honoring scheduled appearances.

Id. at 313 n.1 (quoting Indianapolis Bar Association's *Tenets of Professional Courtesy*).

149. *Id.* at 312.

150. *Id.* (quoting IND. ADMIS. DISC. R. 22).

fulfilling our duty to represent a client vigorously as lawyers, we will be mindful of our obligations to the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful, and efficient manner.¹⁵¹

In addition, the court in *Fire Insurance Exchange* included a quotation from duty number 6 under the section "Lawyers' Duties to Other Counsel," in the Seventh Circuit's Standards: "We will adhere to all express promises and to agreements with other counsel, whether oral or in writing . . ."¹⁵² Finally, the court quoted statements from two professional associations. The court quoted two tenets from the Indianapolis Bar Association's *Tenets of Professional Courtesy*:

A lawyer should never knowingly deceive another lawyer or the court.

A lawyer should honor promises or commitments to other lawyers and to the court, and should always act pursuant to the maxim, "My word is my bond."¹⁵³

Then, the court quoted a statement from the International Association of Defense Counsel, "We will honor all promises or commitments whether oral or in writing, and strive to build a reputation for dignity, honesty and integrity."¹⁵⁴ Except for the Indiana Rules of Professional Conduct and possibly the Indiana Oath of Attorneys, each of these statements quoted by the Indiana Supreme Court are typically regarded as aspirational statements and not as regulatory codes. Based on these aspirational statements, the court concluded that lawyers should be held to a "more demanding standard."¹⁵⁵

Clearly, the court in *Fire Insurance Exchange* announced a rule that lawyers are prohibited from making material misrepresentations to the opposing party, even if the opposing party is represented by a lawyer.¹⁵⁶ The court supported its "more demanding standard" for lawyers by bootstrapping ethical and moral norms as outlined in various, non-enforceable statements on professionalism and civility into its holding. According to the court in *Fire Insurance Exchange*, it is not proper advocacy for lawyer to mislead the opposing party while engaged in settlement negotiations.¹⁵⁷

However, it is not clear from the *Fire Insurance Exchange* case how far a lawyer can go in using "puffery" in settlement negotiations. The supreme court demands more from lawyers than it does from laypeople.¹⁵⁸ Under the holding

151. *Id.* (quoting *Seventh Circuit's Standards*, 143 F.R.D. at 448).

152. *Id.* (quoting *Seventh Circuit's Standards*, 143 F.R.D. at 449).

153. *Id.* (quoting *Tenets II and III of Tenets of Professional Courtesy* adopted by the Indianapolis Bar Association); see *Tenets of Professional Courtesy*, *supra* note 148, at 31.

154. *Id.* at 313 (quoting 60 DEF. COUN. J. 190 (1993)).

155. *Id.* at 312.

156. *See id.* at 313.

157. *See id.*

158. *See id.* at 312.

of the *Fire Insurance Exchange* case, an insurance agent may be found to have acted fraudulently when making misrepresentations to a lawyer because a lawyer, as a sophisticated negotiator, is not permitted to rely on the insurance agent's misrepresentation.¹⁵⁹ A lawyer for an insurance company, however, is not permitted to make the same misrepresentation to the adverse party as the insurance agent because the Indiana Supreme Court, as the constitutional guardian of the legal profession in Indiana, imposes a more demanding standard on lawyers to be honest and trustworthy.¹⁶⁰ It seems that the *Fire Insurance Exchange* case recognized that lawyers are advocates for their clients. However, lawyers' advocacy is limited by their obligations to the legal process as officers of the court.¹⁶¹ Proper advocacy, according to the standards outlined in the *Fire Insurance Exchange* case, exacts a more demanding standard from lawyers than their duty as zealous advocates for their clients' goals.¹⁶² The Indiana Supreme Court requires lawyers to be honest and trustworthy in addition to being advocates while representing their clients.¹⁶³

In 1999, the Indiana Supreme Court returned to their discussion of the proper limits to place on lawyers as advocates for their clients in *Smith v. Johnston*.¹⁶⁴ In *Smith v. Johnston*, the husband of a patient filed a proposed complaint with the Indiana Department of Insurance against a doctor and the doctor's medical group for medical malpractice in the treatment of his wife.¹⁶⁵ The husband was represented by a lawyer during the course of the panel proceeding before the medical review panel. The doctor and his group were represented by a law firm throughout the panel proceeding. After the medical review panel found that the doctor failed to comply with the appropriate standards of care, the husband's lawyer sent a letter to the law firm representing the doctor demanding policy limits to settle the medical malpractice claim.¹⁶⁶

After a month passed with no response to this demand letter, the husband filed suit against the doctor and his group. On that same day, the husband's lawyer received a letter from the law firm representing the doctor rejecting the husband's settlement demand.¹⁶⁷ The doctor and his group were served by certified mail on January 11, 1996, at their place of business.¹⁶⁸ A nurse signed for the summonses. No lawyers filed an appearance on behalf of the doctor or his group.¹⁶⁹ On February 20, 1996 (a little less than six weeks after filing the complaint), the husband's lawyer filed a motion for default judgment. The

159. The court said this would be a question for the jury. *See id.*

160. *See id.*

161. *See id.*

162. *See id.*

163. *See id.* at 313.

164. 711 N.E.2d 1259 (Ind. 1999).

165. *See id.* at 1261.

166. *See id.*

167. *See id.*

168. *See id.*

169. *See id.*

husband's lawyer made no effort to communicate with the doctor's law firm after she sent the settlement demand letter to the law firm representing the doctor.¹⁷⁰ In an affidavit to the trial court, the husband's lawyer stated that:

I certify that no pleading has been delivered to Plaintiffs [the husband and his wife] or to their counsel by the Defendants [the doctor and his group] or any attorney appearing for Defendants, nor to the knowledge of the undersigned has any attorney entered an appearance since the filing of this cause, nor has any attorney contacted undersigned regarding entering their appearance on behalf of Defendants in this case since the filing of this cause.¹⁷¹

The trial court granted the default judgment one day later, and set the matter for hearing on the amount of damages thirty days later. Judgment was entered on the day of the damages' hearing and was served on the doctor but not the doctor's law firm.¹⁷²

Six days after judgment was entered, lawyers from the doctor's law firm entered their appearances on behalf of the doctor and filed a notice of intent to petition to set aside the default judgment.¹⁷³ The doctor moved to set aside the default judgment under Indiana Trial Rule 60(B)(1) for excusable neglect and under Indiana Trial Rule 60(B)(3) for misconduct by the husband's lawyer.¹⁷⁴ The doctor alleged that the husband's lawyer "was obligated to provide a copy of the complaint and subsequent papers to [the doctor's] attorneys when she knew [the doctor] was represented by counsel."¹⁷⁵ The trial court denied the doctor's motion to set aside the judgment.¹⁷⁶ The doctor appealed, and the court of appeals affirmed the trial court's denial of the motion to set aside the judgment, and the Indiana Supreme Court granted the doctor's petition to transfer.¹⁷⁷

The Indiana Supreme Court was not persuaded that the doctor's failure to read his own mail was excusable neglect so as to set aside a default judgment

170. *See id.*

171. *Id.*

172. *See id.*

173. *See id.*

174. IND. T.R. 60(B)(1), 60(B)(3) provide:

(B) Mistake-Excusable neglect-Newly discovered evidence-Fraud, etc. On motion and upon such terms as are just the court may relieve a party or his legal representative from an entry of default, final order, or final judgment, including a judgment by default, for the following reasons:

(1) mistake, surprise, or excusable neglect . . .

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party

175. *Smith*, 711 N.E.2d at 1261.

176. *See id.*

177. *See id.*

under Indiana Trial Rule 60 (B)(1).¹⁷⁸ However, the Indiana Supreme Court concluded that the actions of the husband's lawyer "were prejudicial to the administration of justice and therefore constitute misconduct warranting relief under Trial Rule 60(B)(3)."¹⁷⁹ The *Smith* court held in that "a default judgment obtained without communication to the defaulted party's attorney must be set aside where it is clear that the party obtaining the default knew of the attorney's representation of the defaulted party in that matter."¹⁸⁰

The Indiana Supreme Court in *Smith v. Johnston* was not able to find a duty in the Indiana Trial Rules requiring a plaintiff's lawyer to serve the complaint on a defendant's lawyer.¹⁸¹ The *Smith* court even went so far as to acknowledge that the failure of husband's lawyer to serve the complaint on the doctor's law firm was consistent with the Indiana Trial Rules.¹⁸² The court explained that they agree with the argument of the husband's lawyer that:

Trial Rule 4 calls for service of the summons and complaint on the party, not the attorney, to secure jurisdiction. We also agree that Trial Rule 5(B) requires service of subsequent papers only on attorneys who have filed their appearance in the case. Trial Rules 4 and 5 anticipate that a defendant in a lawsuit may not have retained an attorney at the time suit is filed. Even if the defendant has a lawyer, the plaintiff may not know that. Accordingly, these Rules do not require notice service on an attorney. But neither provision excludes the possibility that the plaintiff's attorney has knowledge of the defendant's representation. We hold that that knowledge gives rise to a corresponding duty under the Rules of Professional Conduct to provide notice before seeking any relief from the court.¹⁸³

To find this duty, the court in *Smith v. Johnston* looked both to the preamble of the Indiana Rules of Professional Conduct and to Indiana Rule of Professional Conduct 8.4(d).¹⁸⁴ The court stated:

The preamble to the Rules is clear that "[t]he Rules, do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules." Thus lawyers' duties are found not only in the specific rules of conduct and rules of procedure, but also in courtesy, common sense and the constraints of our judicial system. As an officer of the Court, every lawyer must avoid compromising the integrity of his or her own

178. See *id.* at 1262.

179. *Id.* at 1264.

180. *Id.* at 1262.

181. See *id.* at 1263.

182. See *id.*

183. *Id.*

184. See *id.* at 1263-64.

reputation and that of the legal process itself.¹⁸⁵

Based solely on the ethical and moral norms of courtesy, common sense and the constraints of our judicial system, the court found that the husband's lawyer had a duty to "take the relatively simple step of placing a phone call" to the doctor's law firm before filing the motion seeking default judgment.¹⁸⁶ The Indiana Supreme Court in *Smith v. Johnston* is bootstrapping ethical and moral norms into the area regulating the conduct of lawyers based on a truism found in the preamble to the Indiana Rules of Professional Conduct, i.e., "[t]he Rules, do not . . . exhaust the moral and ethical considerations that should inform a lawyer"¹⁸⁷

The court in *Smith v. Johnston* also looked to Indiana Professional Conduct Rule 8.4(d) as a guide to determine whether the conduct of the husband's lawyer constituted misconduct which would require the court to set aside the default judgment.¹⁸⁸ Indiana Rule of Professional Conduct 8.4(d) provides, "[i]t is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice. . . ."¹⁸⁹ The court found that the conduct of the husband's lawyer was prejudicial to the administration of justice.¹⁹⁰ The court explained:

The administration of justice requires that parties and their known lawyers be given notice of a lawsuit prior to seeking a default judgment. A default judgment is appropriate only where a party has not appeared in person or by counsel and, if there is a lawyer known to represent the opposing party in the matter, counsel had made reasonable effort to contact that lawyer.¹⁹¹

The court suggested that a lawyer's advocacy for a client is limited by the requirement of the efficient administration of justice.¹⁹² Thus, a lawyer should not seek to gain an unfair advantage by seeking a default judgment without making a reasonable effort to contact the opposing party's lawyer when it is known that the opposing party is represented by a lawyer.

In addition, the court in *Smith v. Johnston* found that the conduct of the husband's lawyer was prejudicial to the administration of justice when she made representations in her affidavit to the court that were literally true, but could be misleading.¹⁹³ The court explained its position as follows:

Neiswinger [the husband's lawyer] filed an affidavit in support of

185. *Id.* (quoting IND. PROFESSIONAL CONDUCT Rules preamble).

186. *Id.* at 1264.

187. *Id.* at 1263-64 (quoting IND. PROFESSIONAL CONDUCT Rules preamble).

188. *See id.* at 1264.

189. IND. PROF. COND. Rule 8.4(d).

190. *Smith*, 711 N.E.2d at 1264.

191. *Id.* (footnote omitted).

192. *See id.*

193. *See id.*

the motion for default which stated that no "attorney contacted [her] regarding entering their appearance on behalf of Defendants in the cause since the filing of this cause." Although the letter from Smith's attorneys rejecting settlement did not specifically address their appearance in the suit, "it clearly indicated that they still represented Smith's interests in the matter. The representation that Neiswinger [the husband's lawyer] had not been contacted by Smith's lawyers "regarding entering their appearance" is literally true. However, it would be easy for a busy trial judge to take this as a statement that Neiswinger had not been contacted *at all* by Smith's attorneys, not that they had contacted her regarding settlement, but not their appearance. This statement may not be a direct misrepresentation, but it certainly creates a potential for misperception on the part of the trial court, and to that extent was also prejudicial to the administration of justice.¹⁹⁴

Here, the court suggested that conduct by a lawyer that creates a mere "potential for misperception" by a trial court exceeds the limits of proper advocacy because this type of conduct by a lawyer can cause problems that waste the time of the judicial system.¹⁹⁵ If the husband's lawyer had picked up the telephone and informed the doctor's lawyer she was intending to seek default judgment, then the case could have been decided on the merits, avoiding the post-judgment process in the *Smith v. Johnston* case. Thus, the lawyer for the husband would not have wasted the time of the judicial system.

The husband's lawyer argued that she had a duty to seek the default judgment as an advocate for her client.¹⁹⁶ The court in *Smith v. Johnston* responded:

Whether or not she had a duty to file for default as soon as the time limit expired, that duty did not preclude her from notifying [the doctor's] attorneys of the suit at the time of filing or when she moved for default. Any lawyer's duty to advance her client's interest is circumscribed by the bounds of the law and her ethical obligations.¹⁹⁷

The court here clearly stated that a lawyer's duty as an advocate for his or her client is not unlimited. The court in *Smith v. Johnston* did not see a lawyer's duty as an advocate for his or her client as an exclusive duty.

However, the court's language in *Smith v. Johnston* is amorphous when it refers to a lawyer's "ethical obligations" as placing a limit on a lawyer's advocacy of his or her client. Ethical and moral norms are not as easily identified as the rules of procedure and professional conduct.¹⁹⁸ Even so, the court in *Smith v. Johnston* suggested that they are proper bases for limiting a lawyer's advocacy

194. *Id.* (emphasis added).

195. *Id.*

196. *See id.*

197. *Id.*

198. *See id.*

duties to duty as an advocate for his or her client.¹⁹⁹

Finally, the husband's lawyer argued that requiring a lawyer to provide notice to the opposing lawyers would make it difficult to obtain a default judgment against health care providers.²⁰⁰ The court responded, "We hope so."²⁰¹ The court explained that a default judgment "is not a trap to be set by counsel to catch unsuspecting litigants."²⁰² In fact, this argument was described by the court as the "gaming view of the legal system," and rejected as unacceptable.²⁰³ The court concluded that the failure of the husband's lawyer to provide notice was not proper conduct for a lawyer.

The "gaming view of the legal system" is one which places the value of zealous advocacy above the value of truth-seeking. The court in *Smith v. Johnston* sees the gaming view as an improper view of the legal system, one which compromises the integrity of the legal system and the integrity of the lawyer.²⁰⁴ Under the court's view in *Smith v. Johnston*, lawyers are not merely hired guns who do whatever the client demands of him or her. The court recognized that lawyers are advocates for their clients; however, the court believed that lawyers are limited in their advocacy by the rules of procedure, the rules of professional conduct, constraints of the judicial system, and ethical and moral norms.²⁰⁵ It is not always clear what the limits of proper advocacy are, but, as a self-governing profession, it is the duty of every lawyer to preserve the reputation of the judicial system as one of integrity.

After reviewing *Smith v. Johnston* and *Fire Insurance Exchange*, it is clear that the Indiana Supreme Court has drawn a line in the sand. In Indiana, lawyers have duties that exceed their role as zealous advocates. These duties include being honest and trustworthy. But honesty and trustworthiness are the outer limits of what the Indiana Supreme Court expects. The Indiana Supreme Court demands that lawyers give the search for truth in the judicial process a higher priority than advocacy, especially that form of advocacy which uses the procedural tools of the law as a trap to catch unsuspecting opponents.

199. *See id.*

200. *See id.*

201. *Id.*

202. *Id.*

203. *Id.* *See also* *McGee v. Reynolds*, 618 N.E.2d 40 (Ind. App. 1993). The *McGee* court held that failure of the plaintiff's attorney to give notice of a lawsuit to the defendant's insurer constituted misconduct sufficient to warrant setting aside the default judgment under Indiana Trial Rule 60(B)(3). *See id.* at 41. Justice Robert Rucker, the newest member of the Indiana Supreme Court, was on the panel of judges from the court of appeals in the *McGee* case. *See id.* at 40. Justice Rucker concurred with the result of the majority opinion in the *McGee* case; however, he was not persuaded that the plaintiff's attorney "engaged in either fraud, misrepresentation, or other misconduct contemplated by *Ind. Trial Rule* 60(B)(3)." *Id.* (Rucker, J., concurring). An interesting question is whether Justice Rucker would have found that the conduct of the husband's lawyer in the *Smith v. Johnston* case constituted misconduct.

204. *See Smith*, 711 N.E.2d at 1264.

205. *See id.* at 1262-64.

II. "HOUSE COUNSEL" OR "CAPTIVE FIRM" LITIGATION

During the period covered by this Article, the Indiana Supreme Court addressed an important professional responsibility issue regarding the way in which the law is practiced when a third-party payor—an insurer—is in the mix. The case is *Cincinnati Insurance Co. v. Wills*.²⁰⁶ At issue is the developing practice by liability insurers of using lawyer-employees to represent insured defendants in personal injury litigation.²⁰⁷ The case was also important to other entities which provide lawyers to render legal services to those other than the insurer proper.²⁰⁸ By way of example, some not-for-profit corporations directly provide lawyers to assist non-members of the corporation.²⁰⁹ Many policies, meanwhile, contain "duty to defend" clauses which require the insurer to provide counsel.²¹⁰ By way of further example, errors and omissions carriers for corporate officers and directors often use policies containing such language. Hence, the opinion generated fairly widespread interest by the bar.²¹¹

On November 11, 1994, Betty Suter's dog started to run into the path of Elaine Mellinger's car on State Road 26 in Tippecanoe County.²¹² Mellinger lost control of her car and hit David Wills.²¹³ Wills then sued Mellinger and Suter for his resulting injuries.²¹⁴ Suter was insured through the Celina Insurance Group and, under the terms of Suter's policy, Celina assigned attorney Keith Faber to defend Suter.²¹⁵ Unlike the traditional arrangement where an insurance company would hire a lawyer from a private firm to represent a defendant, Faber was a salaried employee of Celina.²¹⁶ "Suter was advised that although Faber was employed and paid by Celina, his ethical obligations were owed to Suter alone."²¹⁷ After she consulted with another lawyer, Suter agreed to Faber's

206. 717 N.E.2d 151 (Ind. 1999) (evolving out of personal injury litigation *sub nom. Wills v. Mellinger*, case number 79D01-9605-CP-132, which began in the Tippecanoe County Superior Court).

207. *See id.* at 153.

208. More than a dozen amici curiae participated in the briefing of this case before the Indiana Supreme Court representing all the viewpoints identified in the main body of this Article. *See id.* at 152-53; *see also* Petition of Youngblood, 895 S.W.2d 322 (Tenn. 1995).

209. *See Wills*, 717 N.E.2d at 152-53.

210. *Id.*

211. *See id.*

212. Fact summary taken from the "Order Disqualifying Keith L. Faber From Representing Betty Suter and Requiring Celina Insurance Group and Cincinnati Insurance Company to Cease and Desist from Engaging in the Unauthorized Practice of Law" issued by the Tippecanoe Superior Court on June 11, 1998.

213. *Id.*

214. *See Wills*, 717 N.E.2d at 153.

215. *See id.*

216. *See id.*

217. *Id.*

representation.²¹⁸

Wills, the plaintiff, moved to disqualify Faber as defendant Suter's lawyer claiming that Celina was engaged in the unauthorized practice of law.²¹⁹ Celina is not the only insurer to use salaried lawyers to represent its insureds.²²⁰ The Cincinnati Insurance Company moved to intervene in the litigation because, like Celina, they provided Indiana counsel for their insureds through an entity known as Berlon & Timmel.²²¹ Berlon & Timmel is staffed by salaried employees of the insurance company who represent only insureds and the insurance company itself.²²²

Cincinnati Insurance Company was allowed to intervene and on June 11, 1998, the trial court entered an order granting the plaintiff's motion to disqualify Faber "so long as he continue[d] to be an employee or agent of Celina Insurance Group. . . ."²²³ The trial court reasoned that Faber's continued employment with Celina may aid and abet the insurer's unauthorized practice of law by a corporation.²²⁴ The trial court made a similar finding relative to the Berlon & Timmel lawyers employed by Cincinnati Insurance Company.²²⁵ Based upon these findings, the trial court ordered Berlon & Timmel to close their Indianapolis office.²²⁶ The trial court's order was stayed by the Indiana Court of Appeals and the insurers successfully petitioned for immediate transfer to the Indiana Supreme Court.²²⁷

In a lengthy opinion authored by Justice Boehm, the Indiana Supreme Court identified three central ethical issues associated with the case:²²⁸

1. Whether an insurance company is engaged in the unauthorized practice of law when it employs house counsel to represent its insureds.
2. Whether there is an inherent conflict of interest where an insurance company employs house counsel to represent its insureds.
3. Whether the representation was properly entered into in each particular case.²²⁹

218. *See id.*

219. *See id.*

220. *See id.*

221. *See id.*

222. *See id.*

223. *Id.* at 153-54.

224. *See id.* at 154.

225. *See id.*

226. *See id.*

227. *See id.*

228. *See id.* at 154-55.

229. *Id.* at 155. In relevant part, Indiana Professional Conduct Rule 7.2 provides, "A lawyer shall not practice under a name that is misleading as to the identity, responsibility or status of those practicing thereunder, or is otherwise false, fraudulent, misleading [or] deceptive" IND. PROF.

A. The Jurisdictional Issue

At the outset, the Indiana Supreme Court noted that the regulation of the bar is, as a general matter, within their exclusive jurisdiction under the Indiana Constitution.²³⁰ The court explained that the trial court had wide authority in regulating the activity in its court in relation to the attorneys who appear before it, but that does not include regulation of the bar as a whole.²³¹ It also noted that the trial court's order to Berlon & Timmel to close its doors was a sweeping remedy that is only available to the Indiana Supreme Court through its constitutional grant.²³² Finally, the court explained that it granted immediate transfer not only to resolve the jurisdictional issue, but to deal with what it perceived to be an important question for the members of the bar.²³³

B. The Unauthorized Practice of Law by a Corporation Issue

The Indiana Supreme outlined the syllogism used by the trial court in concluding that "house" counsel were assisting their corporate employer in the unauthorized practice of law.

- (1) the attorney-agents of Celina are engaged in the practice of law;
- (2) Celina, a corporation, can act only through agents;
- (3) the acts of the attorneys are those of Celina;
- (4) Celina is engaged in the practice of law.²³⁴

After working through the syllogism the trial court concluded "that Celina's practice of law was unauthorized because Indiana's professional corporation statute implicitly prohibits general business corporations and insurance companies from practicing law."²³⁵

The Indiana Supreme Court, by way of analogy, concluded that the trial court's logic was erroneous.²³⁶ The supreme court agreed that a legal entity

COND. R. 7.2.

230. See *Wills*, 717 N.E.2d at 154. Article 7, section 4 of the Indiana Constitution provides in part:

The Supreme Court shall have no original jurisdiction except in admission to the practice of law; discipline or disbarment of those admitted; the unauthorized practice of law; discipline, removal and retirement of justices and judges; supervision of the exercise of jurisdiction by the other courts of the State; and issuance of writs necessary or appropriate in aid of its jurisdiction

IND. CONST. art. VII, § 4.

231. See *Wills*, 717 N.E.2d at 154.

232. See *id.*

233. See *id.*

234. *Id.* at 156.

235. *Id.*

236. See *id.* at 159-60.

could be responsible for the professional actions of its partners, employees, and agents under the doctrine of respondeat superior.²³⁷ The court determined, however, that this fact alone did not demonstrate that Celina was engaged in an unlawful practice.²³⁸ The court held that the practice of law requires a license, and, when licenses are required, agency law permits an unlicensed legal entity to utilize the services of licensed agents.²³⁹ The court ultimately concluded that the mere fact that a lawyer was an insurance company's employee was no bar to the concurrent representation of the employer and someone else.²⁴⁰ In other words, the situation itself was not inherently problematic.²⁴¹

C. The Inherent Conflict of Interest Issue

The Indiana Supreme Court acknowledged the growing body of professional literature concerning the issue of whom the lawyer owed his duty of loyalty in the situation where the attorney is an employee of the insurer and is doing work historically done by outside counsel.²⁴² The court found it "unrealistic" to analyze the arrangement without recognizing the lawyer's client relationship that exists with both the insurer and the insured.²⁴³ The opinion describes two situations where the interests of the two clients are in conflict: the situation where confidences of the two clients are exchanged and the situation where the insured provides confidential information affecting coverage that puts the two parties at odds.²⁴⁴ The existence of a conflict, however, is not the end of the analysis. Using the Indiana Professional Conduct Rules, the court noted that many conflicts can be waived by the parties and, in fact, the rules contemplate that such waivers will take place.²⁴⁵ The existence of a problematic conflict of

237. *See id.* at 159.

238. *See id.* at 159-60.

239. *See id.* at 160 (citing RESTATEMENT (SECOND) OF AGENCY § 19, cmt. d (1958)).

240. *See id.*

241. *See id.*

242. *See id.* at 161.

243. *Id.*

244. *See id.*

245. *See id.* In particular, the court reviewed the Indiana Professional Conduct Rule 1.7 which provides,

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person,

interest will clearly be the exception, rather than the rule:

If a conflict arises, it will have to be handled, and there are a variety of means to do that. But a vast number of claims have been and presumably will be handled with no significant issue between the insurer and the policyholder. Interests of economy and simplicity dictate that this be permitted to continue. Any abuses can be handled on a case-by-case basis rather than by adoption of the broad prohibition the Wills seek. Although issues may arise in dual representation, none are apparent in this case.²⁴⁶

The supreme court analyzed the appropriate statutes and provisions in the Indiana Professional Conduct Rules and concluded that the plaintiff failed to present evidence that specifically condemned Faber's conduct.²⁴⁷ In the end, the court concluded that its analysis of a specific situation would depend on the commonality of interests of the jointly represented clients.²⁴⁸ Even then, the court added,

As demonstrated by this case, free access to the market of legal services and the protection of the public is a delicate balance with results that are not always predictable. As noted in [its analysis under Indiana's Rules of Professional Conduct], in the realm of insurance defense, the public may ultimately reap the benefits of better service at lower cost through the use of house counsel. Although we find no inherent detriment to the general public in the defense of insurance claims by house counsel, we reiterate the fact that the Rules of Professional Conduct, the disciplinary procedures, and other civil remedies exist for the protection of all clients, whether the attorney is house counsel, a sole practitioner, affiliated with a traditional law partnership, or anything else.²⁴⁹

D. The Use of the Name "Berlon & Timmel"

The trial court found that the use of the name Berlon & Timmel by Cincinnati Insurance Company's employee lawyers violated Indiana Professional

or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

IND. PROF. COND. R. 1.7.

246. *Wills*, 717 N.E.2d at 161.

247. *See id.* at 162.

248. *See id.* at 163.

249. *Id.* at 163-64.

Conduct Rule 7.2 because the name gave the appearance of independence.²⁵⁰ The Indiana Supreme noted that the letterhead bore the following language: "Berlon & Timmel is an unincorporated association, not a partnership, of individual licensed attorneys employed by The Cincinnati Insurance Company for the exclusive purpose of representing the Cincinnati Insurance Companies and their policyholders."²⁵¹ The supreme court agreed with the trial court's analysis the use of this name was misleading to the public.²⁵² The court held that the disclosure language was not sufficient to put Cincinnati's insureds on notice of the actual status of the lawyers who were representing them.²⁵³ Then, offhandedly, the court noted that perhaps, "the name was adopted without much reflection."²⁵⁴ In the end, the court resolved this issue by ordering Cincinnati's lawyers to cease using the Berlon & Timmel firm name. In sum, house counsel was permitted to continue to operate as they had been doing, but could not practice under a misleading entity name.²⁵⁵

V. THE VIEW IN OTHER STATES

The Indiana Supreme Court opinion in *Wills* is epitomizes the view held by a majority of the courts nationwide who have confronted the issue either through judicial decision or bar association ethics opinions.²⁵⁶ Note that, in *Wills*, the case came to the Indiana Supreme Court through the plaintiff's motion to disqualify opposing counsel at the trial court level.²⁵⁷ This is a procedurally irregular path to the court and, strictly speaking, not an "original action" under the court's constitutional grant or its own "original action" rules.²⁵⁸

The analysis in the *Wills* opinion is very similar to the approach taken by the Tennessee Supreme Court in the case of *Petition of Youngblood*.²⁵⁹ Like the lawyers in *Wills*, the petitioning lawyers in *Youngblood* were all employees of various liability insurers.²⁶⁰ The petitioners contested an ethics opinion issued by the Board of Professional Responsibility that stated:

1. It is improper for in-house attorney employees of an insurance

250. See *id.* at 164. Rule 7.2(b) provides in pertinent part, "A lawyer shall not practice under a name that is misleading as to the identity, responsibility, or status of those practicing thereunder, or is otherwise false, fraudulent, misleading, deceptive, self-laudatory or unfair . . ." IND. PRO. COND. R. 7.2(b).

251. *Wills*, 717 N.E.2d at 164.

252. See *id.*

253. See *id.*

254. *Id.* at 165.

255. See *id.*

256. See *id.* at 155 nn.4-5.

257. See *id.* at 153-54.

258. See generally Indiana's Rules of Procedure for Original Actions, Writs of Mandate and Prohibition (1980).

259. 895 S.W.2d 322 (Tenn. 1995).

260. See *id.* at 325.

company to represent individual insureds in legal matters arising under that company's policy.

2. Such an arrangement constitutes a lay corporation practicing law.

3. The holding out of an in-house attorney employee as a separate and independent law firm constitutes an unethical and deceptive practice.²⁶¹

The petitioners argued that the Board's construction of the disciplinary rules is subject to review by the court, that the determinations made in the opinion were neither required nor permitted by the rules and that the opinion should be invalidated.²⁶² Like the lawyers in *Wills*, the petitioners were faced with the desire to have their concerns heard by the state's high court but without a clear procedural mechanism to give vent to their problem.

The Board of Professional Responsibility insisted that its opinion accurately resolved the ethical issues presented and asked the court to appoint a special master to make findings on the matter.²⁶³ The Chattanooga Bar Association, meanwhile, filed an amicus curiae brief that argued that the court did not have jurisdiction to review a formal ethics opinion issued by the Board.²⁶⁴ The court concluded that a special master could not develop determinative findings more instructive than the court's review of three findings already made by the Committee.²⁶⁵ The Tennessee Supreme Court further found that because the court, 1) established the Board of Professional Responsibility by court rule, 2) provided its operating rules, and 3) named it the "Board of Professional Responsibility of the Supreme Court of Tennessee" that their claim to jurisdiction over that entity's actions was pretty well beyond dispute.²⁶⁶

The Chattanooga Bar Association, one of twenty-two amici involved in the case,²⁶⁷ also argued that the petitioners had no standing to file an original petition with the court.²⁶⁸ The court disagreed and held:

In this case, the formal ethics opinion finds that petitioners' employment constitutes unethical conduct for which they are at risk of being sanctioned and, therefore, effectively prohibits their continued employment. No other authority may revise the rules of the Court; consequently, under these circumstances, the petitioners have standing to file an original petition in this Court seeking review of the opinion.²⁶⁹

261. *Id.* at 324 (citation omitted).

262. *See id.* at 325.

263. *See id.*

264. *See id.*

265. *See id.*

266. *Id.*

267. *See id.* at 324 n.2.

268. *See id.* at 326.

269. *Id.*

The court also discussed the appropriateness of the petitioners' challenge in light of the practice in some states, notably Rhode Island, where an attorney is fully protected from a charge of impropriety if he or she conforms to the standards set forth in a state ethics opinion.²⁷⁰ The Tennessee Supreme Court found these to be sufficient bases for keeping the question before them.²⁷¹

The Tennessee Supreme Court analyzed the three issues presented in a manner similar to the *Wills* court. First, Board of Professional Responsibility found that it was "improper for in-house attorney employees of an insurance company to represent individual insureds in legal matters arising under that company's insurance policy."²⁷² The court discussed the issue at length. It examined those circumstances where conflicts obviously arise from the arrangement and concluded that the simple fact that the employment relationship itself did not create a conflict of interest.²⁷³ The court determined that because the Board's opinion interpreted Tennessee's Code of Professional Responsibility, the appropriate method of analysis is to examine each situation on a case-by-case basis.²⁷⁴ This is something the Board did not do.²⁷⁵ In the end, the court determined that without a specific, problematic fact situation, there was no conflict of interest solely based on the employment arrangement.²⁷⁶

Because the opinion bases its finding upon the potential for conflict in the relationship of employer-employee rather than particular facts which demonstrate there is, in fact, a conflict of interest, it does not reflect a proper interpretation of the Code. The conclusion stated in the formal ethics opinion on this issue is, therefore, vacated.²⁷⁷

The Tennessee Supreme Court then moved on to the Board's second finding that the arrangement between salaried in-house lawyers and the insurers constituted a lay corporation engaging in the practice of law.²⁷⁸ The court rejected the lower court's finding that this constituted fee-splitting.²⁷⁹ Therefore, the financial arrangement between the two parties does not constitute a violation of Tennessee law.²⁸⁰ An important feature of the court's analysis on the "corporate practice of law" issue was its use of the notion of a "commonality of interests" between the purported antagonists.²⁸¹

270. See *id.* (citing *In re Ethics Advisory Panel Opinion*, 554 A.2d 1033, 1034 (R.I. 1989)).

271. See *id.*

272. *Id.* at 329.

273. See *id.* at 329-30.

274. See *id.* at 327.

275. See *id.* at 330.

276. See *id.*

277. *Id.* at 330.

278. See *id.*

279. See *id.*

280. See *id.*

281. *Id.*

The furnishing of legal services to an insured by a liability insurance company has generally been found not to constitute the unauthorized practice of law because of the identity or community of financial interest between the insured and insurer in defending the claim and because of the insurer's contractual obligation to defend the insured at the insurer's expense.²⁸²

In other words, the duty to defend is one that applies to the insurer whether in-house lawyers are used or otherwise. In the end, the court concluded that a lawyer's salaried employment did not, a priori, compromise the lawyer's independent professional judgment.²⁸³ The court again acknowledged that it would look at the specific facts of each situation before deciding whether a conflict of interest existed or not.²⁸⁴

Finally, the Tennessee Supreme Court addressed the issue of the name under which the salaried lawyers practiced.²⁸⁵ Representing to the public that the lawyers practiced in some separate and independent entity other than the insurance company was found to be forbidden.²⁸⁶ The court held,

The representation that the attorney-employee is separate and independent from the employer is, at least, false, misleading, and deceptive. It may be fraudulent, depending upon the circumstances under which the representation is made.

The petitioners admit that the practice they advocate gives the public the impression that they are engaged in the general practice of law as partners or as sole practitioners. However, they would justify the misrepresentation on the ground that general identification of the attorney-employee with the insurer-employer must be avoided and, public disclosure of the real relationship between the insurer and the attorney would serve no useful purpose. The prohibition contained in the Code is not limited to false, misleading, fraudulent, and deceptive representations which are demonstrated to be harmful, nor will the Code be construed so narrowly on this important principle. And further, false, misleading, fraudulent, and deceptive representation are by their very nature harmful to the profession, whose credibility is dependent upon its integrity.²⁸⁷

The Tennessee Supreme Court, following precedent from the New Jersey Supreme Court,²⁸⁸ outlawed the use of a law firm name or any designation which

282. *Id.* at 330-31.

283. *See id.* at 331.

284. *See id.*

285. *See id.* at 331-32.

286. *See id.* at 331.

287. *Id.* at 331-32.

288. *See id.* (citing *In re Weiss, Healey & Rea*, 536 A.2d 266 (N.J. 1988)).

made the lawyers appear to be independent of the insurance company that paid them.²⁸⁹ The Indiana Supreme Court in *Wills* has taken a similar course in condemning the use of a law firm name by in-house counsel on the basis that it misled the insureds who would be the clients whom the lawyers would represent.²⁹⁰

F. Indiana's Opposing View

The opposition to house-counsel practice found a strong voice in the dissenting opinion authored by Associate Justice Brent Dickson.²⁹¹ Justice Dickson's opinion discussed at length the Indiana Supreme Court's long line of decisions discussing the privilege to practice law and identifying numerous acts found in the past to constitute the practice of law.²⁹² The dissent also recognizes the absence of laws either promulgated by the supreme court or enacted by the General Assembly to prohibit the specific wrong alleged by the plaintiffs in the instant case.²⁹³ Observing that the practice of law is limited to natural persons, Justice Dickson would have ruled that the use of in-house counsel did, in fact, constitute the corporate practice of law and was, therefore, a relationship which violated both Indiana's Rules of Professional Conduct and Indiana's criminal statute forbidding the unauthorized practice of law:

It has been recognized that "[c]onflicts of interest potentially affecting the quality of the representation are inherent in situations in which an insurance carrier has agreed to provide a defense for its insured." Whether the situation is analyzed as one in which the attorney provides dual representation to both insurer and insured or as one in which the attorney represents the insured alone but the legal fees are paid by the third-party insurer, the essential issues are the same: are any material limitations placed on the representation; is there interference with the attorney's independence of professional judgment; or is there interference with the client-lawyer relationship? In this "triangle," the attorney faces conflicting interests—loyalty to the insurer-client or loyalty to the insured-client. Understandably, both insurers and insureds have a common interest in defending against claims brought by plaintiffs. However, they often have different interests in terms of indemnification, confidentiality, trial tactics, willingness and ability to settle, coverage issues, excess liability exposure, etc. These problems are only exacerbated when house counsel represents insureds.

While most members of the bar earnestly endeavor to fulfill their obligations under the Rules of Professional Conduct, I believe that the

289. See *id.* at 332.

290. See *Cincinnati Ins. Co. v. Wills*, 717 N.E.2d 151, 164-65 (Ind. 1999).

291. See *id.* at 165 (Dickson, J., dissenting).

292. See *id.* at 165-83.

293. See *id.* at 176-77.

use of insurer-employed staff attorneys to represent insureds is inherently problematic. This situation presents conflicts of interest so inherent in the representation and so serious that the attorney-client relationship and the quality of the representation are at risk, despite the possible absence of substantive impropriety in a majority of individual cases. This practice is so fraught with danger that a *per se* rule of disqualification should be imposed. A prophylactic ban is justified because our interest in maintaining public confidence in the legal system outweighs the interest of individual lawyers and individual clients in freely contracting with each other.²⁹⁴

The opinion challenges the majority view that, in essence, the plaintiff and defense bar will have to "duke out" this dispute in the marketplace.²⁹⁵ The dissent exhorts the majority to, "not abandon to the marketplace our duty and responsibility to regulate the practice of law."²⁹⁶

CONCLUSION

The most remarkable developments in professional responsibility have, most recently, been associated with questions of substantive law. As cases like *Smith v. Johnston* and *Cincinnati Insurance v. Wills* should hopefully demonstrate, the lawyer's ethical duties are not a separate and distinct part of his or her life. Duty, integrity, and honesty are part and parcel to the lawyer's day to day practice and the Indiana Supreme Court expects those qualities from all members of its bar.

294. *Id.* at 181 (citations omitted).

295. *Id.* at 183.

296. *Id.*

RECONSTRUCTING PROPERTY LAW IN INDIANA: ALTERING FAMILIAR LANDSCAPES

LLOYD T. WILSON, JR.*

One of the many functions served by law is to provide a framework for the orderly transaction of business; in fact, no meaningful business would be possible without a legal system to provide for the realization of legitimate expectations and for the enforcement of relied-upon promises.¹ One indispensable component of a party's decision to enter into a transaction or of his "pricing" of his good or service, in the form of the consideration he will demand of the other party, is the degree to which the law can be expected to promote or to hinder the realization of the desired goal of the deal.² Whenever the legal framework is altered, either by judicial decision in the case of the common law or by legislative enactment in the case of statutory law, the dynamics of the relationships between or among parties to a transaction are also altered. Customs and practices that were formerly appropriate can become unsuitable and require change, and previous bargaining decisions may have to be rethought if changes to the law alter the allocation of risks and rewards. Significant changes to the law produce a corresponding increase in the degree of uncertainty about the legal framework underlying business transactions. Such changes can take the form of a new allocation of substantive rights among parties or new statutory terms with uncertain definitions.

In 1999 the Indiana Legislature enacted statutes and the Indiana appellate

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1. See ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* 209 (Beacon Press, 1963).

2. See, e.g., Marshall E. Tracht, *Renegotiation and Secured Credit: Explaining the Equity of Redemption*, 52 VAND. L. REV. 599, 620-26 (1999). Although not individually reviewed in this Article, the Indiana Court of Appeals decided a case of first impression in 1999 closely related to the equity of redemption. In *Cunningham v. Georgetown Homes, Inc.*, 708 N.E.2d 623 (Ind. Ct. App. 1999), the court "addressed the respective rights of the parties to a cooperative living situation . . . [and] what process a cooperative association must follow to dispossess a member of her unit." *Id.* at 626. Adopting a "hybrid approach" that reflected the hybrid nature of a cooperative housing arrangement—partly like a base and partly like fee ownership—the court held that ejectment is the proper remedy for removing a cooperative member who has violated the occupancy agreement, but "other proceedings" are required to protect the member's equity in her unit. *Id.* at 627. The court did not order the cooperative to follow statutory foreclosure procedures but instead authorized the trial court to direct a judicial sale of the departing member's unit. See *id.*

courts issued opinions that significantly changed or defined the law applicable to real estate transactions in this state, including laws that had been in existence for several or even many decades. The affected areas of law include: 1) mechanic's liens procedures; 2) duties of real estate licensees to sellers and buyers; 3) liability of "operators" for environmental contamination clean-up costs resulting from leaking underground storage tanks; and 4) tort and contract claims asserted by tenants against landlords. Parties to real estate transactions will find that the legal "lay of the land" to which they had been accustomed, and on which they had based business decisions, has been altered or defined in possibly unexpected ways. In some areas, the alteration will lend certainty to business relationships, and the parties involved should be comfortable in the new legal landscape. In other areas, the alteration is less successful at establishing certainty or defines the law in ways one party finds undesirable, and the terrain will be less reassuring. In both areas, changes in established transactional procedures and expectations will be required.

I. MECHANIC'S LIEN STATUTE

Like all states, Indiana has a mechanic's lien statute.³ The purpose of the statute is to facilitate payment to contractors, subcontractors, mechanics, lessors of construction equipment, material suppliers, laborers, and "all other persons performing labor or furnishing materials or machinery"⁴ for the improvement of real estate by providing to such persons a lien upon the real estate that is improved by their efforts.⁵ Although the mechanic's lien statute has occasionally been amended, the provisions in place prior to the 1999 amendments strongly resembled the version enacted in 1909.

However, House Enrolled Act No. 1367,⁶ effective on July 1, 1999, altered the long-familiar landscape. The amendments should reinforce the legal framework supporting mechanic's lien use and should reduce the level of uncertainty that in the past adversely affected the risk analysis of parties involved in the improvement of real estate. This conclusion is supported by the fact that, at least with regard to mechanic's liens asserted against real estate used for commercial purposes, the amendments are intended to eliminate uncertainties in the priority of claims asserted against the value of the improved real estate by construction lenders and mechanic's lien holders. One can infer from the speed and ease with which the Act moved through the legislature that the amendments were supported by representatives of both the lending and construction

3. See IND. CODE §§ 32-8-3-1 to -3-15 (1998 & Supp. 1999).

4. IND. CODE § 32-8-3-1 (Supp. 1999).

5. See generally *Abbey Villas Dev. Corp. v. Site Contractors, Inc.*, 716 N.E.2d 91, 98 (Ind. Ct. App. 1999) ("The purpose is to promote justice and honesty, and to prevent the inequity of an owner enjoying the fruits of the labor and material furnished by others, without recompense.") (citations omitted), *trans. denied*, 2000 Ind. LEXIS 355 (Ind. Apr. 19, 2000).

6. Act of April 23, 1999, Pub. L. No. 53-1999, 1999 Ind. Acts 292 (codified as amended at IND. CODE § 32-8-3-1 (Supp. 1999)).

communities.⁷ Such support would be reasonable as the amendments represent an effort to allocate, in a manner acceptable to both groups, the risks of each in relying on a promise of payment for money lent or for labor, materials or equipment supplied to improve real estate used for commercial purposes.

*A. The 1999 Amendments: Balancing the Interests of
Construction Lenders and Mechanics*

The substantive changes made to mechanic's lien rights and procedures by the 1999 amendments are implemented by creating three classifications of real estate that are defined by the use to which the real estate is put. The scope of the first classification encompasses "[a] Class 2 structure (as defined in IC 22-12-1-5) or an improvement on the same real estate auxiliary to a Class 2 structure (as defined in IC 22-12-1-5)."⁸ A Class 2 structure is "[a] building or structure that is intended to contain or contains only one (1) dwelling unit or two (2) dwelling units unless any part of the building or structure is regularly used as a Class 1 structure."⁹ In general terms, this classification can be called residential real estate.

The second classification includes:

Property that is: (A) owned, operated, managed, or controlled by a public utility (as defined in IC 8-1-2-1), municipally owned utility (as defined in IC 8-1-2-1), joint agency (as defined in IC 8-1-2.2-2), rural electric membership corporation formed under IC 8-1-13-4, or not-for-profit utility (as defined in IC 8-1-2-125) regulated under IC 8; and (B) intended to be used and useful for the production, transmission, delivery, or furnishing of heat, light, water, or power to the public.¹⁰

Such real estate can be referred to as utility real estate. All real property that is neither residential nor utility property can be referred to as commercial real estate. Real estate used for residential and utility purposes is excluded from the operation of most of the 1999 amendments, the brunt of which falls on real estate used for commercial purposes.¹¹

7. HB 1367 was authored on January 12, 1999, and was given its first reading on that date. By April 8, 1999, the bill had been given second and third readings, had been voted on in the house, had been referred to the senate where it was given three readings and was amended and voted on. The bill was then returned to the house, where another vote was taken and then signed by the speaker. The entire process took only 86 days and the vote totals were 303 yeas and three nays.

8. IND. CODE § 32-8-3-1(c)(1).

9. *Id.* § 22-12-1-5(a)(1) (1998). Outbuildings for such structures are also included within the definition of a Class 2 structure. *See id.* § -5(a)(2). A Class 1 structure is defined in section 22-12-1-4. *Id.* § 22-12-1-4 (Supp. 1999). The Class 1 and Class 2 designations originate in that part of the Indiana Code dealing with fire safety and building and equipment laws. *See Fire, Safety, Building, and Equipment Laws: General Administration*, IND. CODE § 22-12 (1998).

10. *Id.* § 32-8-3-1(c)(2) (Supp. 1999).

11. For purposes of this Article, real property is characterized as residential, utility, or

Two major substantive rights conferred by the mechanic's lien statute are determined by the new property characterizations. One is that a no-lien provision or stipulation "can only be included" in a construction contract relating to the improvement of residential and utility properties.¹² The necessary corollary of this phrase is that no-lien provisions are not authorized beyond these property classifications and may no longer be included in contracts for the improvement of commercial real estate.¹³

Prior to the effective date of the Act, lenders, as a condition of making a construction loan, often required owners to require the general contractor on the project to execute a no-lien contract, by which the general contractor agreed not to file any liens against the owner's property. This agreement, if properly documented and timely recorded in the office of the recorder in the county in which the real estate is located, was then binding on all subcontractors and their employees and on equipment and material suppliers working on the project through subcontracts with the general contractor.

A no-lien contract has considerable value to a construction lender because it avoids priority battles between the mortgage lien of the lender and the potential statutory liens of mechanics.¹⁴ Under pre-amendment law such battles frequently arose as a result of the "relation back" rule of the mechanic's lien statute.¹⁵ Pursuant to this rule, the effective date of a mechanic's lien was the date on

commercial. These labels are used for convenience, however, and the reader should not overlook the precise definitions, including cross-references, provided in the Act. For example, a structure that otherwise would be a "Class 2 structure" can lose that designation if any part of it is "regularly used as a Class 1 structure." *Id.* § 22-12-1-5 (1998). Thus, it is necessary to consult the definition of a "Class 1 structure." Additionally, the list of utilities in section 32-8-3-1(C)(2) of the Indiana Code includes only utilities regulated under Title 8 and "intended to be used and useful" for the "production, transmission, delivery, or furnishing of heat, light, water, or power to the public." *Id.* § 32-8-3-1(c)(2) (Supp. 1999).

12. The writing and recording requirements for an enforceable no-lien contract on residential or utility improvement projects have not been changed by the 1999 amendments.

13. The act does not specifically state whether a no-lien provision in a contract for improvement of commercial property is void or merely voidable. Other amendments to the statute, declare actions contrary to the statute to be void. *See* IND. CODE §§ 32-8-3-15, -17, -18. It is reasonable to infer that the legislature's declaration that a no-lien provision "may only be included" in a construction contract relating to residential or utility property would likewise render the inclusion of such a provision in a construction contract relating to commercial property void.

14. For convenience, the term "mechanic" is used in this article to represent all persons within the scope of section 1 of the mechanic's lien statute.

15. Section 5 of the pre-amendment mechanic's lien statute provided that all valid mechanic's liens "shall relate to the time when the mechanic or other person began to perform the labor or furnish the material or machinery." IND. CODE § 32-8-3-5 (1998), *amended by* § 32-8-3-5 (Supp. 1999). The 1999 amendments retain this language but then add the rule that confers on lenders priority over "all liens under this chapter recorded after the date the mortgage was recorded" if the mechanic's work is performed on real estate used for commercial purposes. *Id.* § 32-8-3-5(c) (Supp. 1999).

which the mechanic *first* provided labor, materials, or equipment to the project even though the notice of intention to hold the lien did not have to be recorded until sixty days after the date such labor, materials, or equipment was *last* provided to the project. In other words, a lender contemplating making a construction loan was faced with the prospect that an as-yet unrecorded mechanic's lien could later be perfected and be senior to the lender's mortgage even though that lien was undiscoverable on the public records at the time the construction loan was made.¹⁶

No-lien contracts eliminate that risk by precluding the filing of any mechanic's liens, thereby leaving priority of the lender's security position unchallengeable by mechanics. The loss, created by the 1999 amendments, of a lender's ability to require construction on commercial real estate to proceed pursuant to a no-lien contract adversely affects that lender's risk in the loan transaction. Were it not for a corresponding change included in the amendments affecting the competing rights of mechanics, the prohibition of no-lien contracts would likely have resulted in construction lenders either seeking other ways to secure their position or increasing the cost of construction credit or both.

That corresponding and counterbalancing change made by the 1999 amendments is the elimination of the "relation back" rule for mechanic's liens filed with regard to commercial projects and the substitution of a rule that establishes priority of liens based on date of recordation.¹⁷ For construction contracts executed after June 30, 1999, relating to the improvement of commercial real estate, the statute now provides, "The mortgage of a lender has priority over all liens under this chapter recorded after the date the mortgage was recorded to the extent of the funds actually owed to the lender for the specific project to which the lien rights relate."¹⁸ In terms of evaluating business risks and making business decisions, this change lends certainty to the legal framework relied upon by lenders.

The elimination of the relation back principle in commercial projects has the direct positive effect of enabling construction lenders to rely on the recording process in making credit and collateral decisions. It also has the additional positive effect of closing one of the gaps in the recording system that impaired its integrity. If no mechanic's liens appear in the records of the county recorder, the lender can now be assured that its construction mortgage on commercial

16. See, e.g., *Greyhound Financial Corp. v. R.L.C, Inc.*, 637 N.E.2d 1325, 1328 (Ind. Ct. App. 1994) ("We conclude that a properly recorded and perfected mechanic's lien takes priority over a mortgage which is executed before labor or materials are first furnished for the property but reworded after labor or materials are first furnished.").

17. The elimination of the "relation back" principle does not apply to a lien that relates to a construction contract for the development, construction, alteration, or repair of residential or utility property. See IND. CODE § 32-8-3-5(c). Thus, the act does not alter the risk of priority battles with mechanics faced by construction lenders on non-commercial projects prior to the amendment. On construction projects relating to residential and utility real estate, the construction lender retains its right to require that construction proceed only by way of no-lien contract.

18. *Id.* The amendments also contain a new definition of "lender." See *id.* § 32-8-3-5(a).

property will not become subordinate to a later-recorded mechanic's lien that relates back to a date prior to the date of the mortgage. If one or more mechanic's liens appear of record, the lender can either require their payment and release as a condition of making the loan or can negotiate their subordination to the mortgage.

At the same time, mechanics can no longer be prohibited by no-lien provisions from recording their liens and thus will be able to improve their status from that of unsecured creditor, which would be their lot under a no-lien contract, to that of secured creditor. Even if the mechanic's security position is junior to a previously recorded construction lender's mortgage, the mechanic may be able to obtain priority over other competing non-mechanic's lien creditors who are either unsecured or who perfect their security interests after the date the notice of intention to hold mechanic's lien is filed.¹⁹

Preserving the right to record a mechanic's lien is also important in the event the owner files a petition in bankruptcy. Under a no-lien contract, the mechanic would fall into the class of general unsecured creditors of the debtor's estate. But with the mechanic's lien rights preserved by the elimination of no-lien contracts, mechanics can perfect their liens and achieve secured creditor status even after the bankruptcy petition is filed.²⁰ Such elevation in creditor status may result in payment from the debtor's estate greater than would have been achieved as an unsecured creditor.

Finally, in what may be seen as additional benefit for mechanics to compensate for the abolition of the relation back rule for contracts involving the improvement of commercial real estate, the amendments extend the time within which a notice of intention to hold mechanic's lien can be filed. Under pre-amendment law, the notice of intention to hold a mechanic's lien had to be filed within sixty days after the date labor was last performed or material or equipment was last provided.²¹ That deadline is now extended to ninety days.²² This change improves the ability of a mechanic to achieve secured creditor status but does not alter the method for determining priority between mechanics and mortgagees based on date of recordation.

19. The 1999 amendments continue the prior rule that multiple, competing mechanic's liens share in the value of the improved real estate on a pro-rata basis and as to such liens "there shall be no priority." *Id.* § 32-8-3-5(b).

20. Post-petition perfection of a mechanic's lien is not stayed by § 362(a) nor is it subject to invalidation by the trustee under § 544 or § 545 of the Bankruptcy Code as § 362(b) and § 546(b) combine to permit post-petition perfection of a mechanic's lien. *See* 11 U.S.C. §§ 362, 544, 545, 546 (1994 & Supp. IV 1998). *See, e.g., In re Petroleum Piping*, 211 B.R. 290, 301 (Bankr. N.D. Ind. 1997) ("Pursuant to § 362(b)(3), § 546(b) provides an exception to the general rule that the petition stays actions to perfect an interest and allows the post-petition perfection of a lien in limited circumstances.") (citations omitted).

21. *See* IND. CODE § 32-8-3-3(a) (1998), amended by § 32-8-3-3 (Supp. 1999).

22. *See id.* The time within which a notice of intention to hold mechanic's lien must be filed on residential and utility projects remains unchanged at sixty days. *See id.* at § 32-8-3-3(b) (Supp. 1999).

B. Implementing the New Balance

The amendments make five other notable changes to the mechanic's lien statute, each of which is necessary to insure implementation of the newly achieved balance of the interests of construction and mechanics lenders and to preclude attempts to undo that balance. Three of these changes operate to prohibit agreements other than no-lien provisions that would prohibit a mechanic from filing a lien. First, section 16(b) declares that a provision in a contract for the improvement of commercial real estate which requires a person who furnishes labor, materials, or machinery to waive a right to a lien against the real estate or to a claim against a payment bond before that person is paid is void.²³ Second, section 16(c) declares void any provision in a construction contract by which one or more persons agree not to file a notice of intention to hold mechanic's lien.²⁴ Third, section 18 prohibits "if paid/when paid" provisions in construction contracts.²⁵

These provisions are intended to prohibit the waiver of mechanic's lien rights by direct contract, as opposed to indirect waiver as is accomplished through agency principles in a no-lien contract. If such provisions were not prohibited, an owner, or his lender, could accomplish through individual contracts with subcontractors a result that he can no longer accomplish through a contract with a general contractor that bound all subcontractors.

Section 16(b) should not, however, affect the ability of a construction lender to require partial lien waivers from mechanics in connection with progress payments on a construction project. This section prohibits direct lien waivers "before the person is paid for the labor or materials furnished."²⁶ Partial lien waivers routinely required by construction lenders relate only to completed work for which payment is tendered. When he is paid, a mechanic no longer has a right to assert a lien against the owner's real estate; therefore, requiring a partial waiver at that time will not upset the balance achieved by the amendments. Nor does a partial waiver given through a specified date impair the mechanic's ability to record a lien in the future if he is not paid for subsequent work. If the consideration for the partial lien waiver is paid by a check, the waiver can be conditioned on payment of the funds by the owner's bank.

The other two notable changes are provisions that insure the balance struck by the legislative process in Indiana is not replaced by contractual agreement to submit disputes to another jurisdiction that may have implemented a different balance of the parties' interests. Section 17 now voids any "choice of law" provision in a contract for the improvement of real estate in Indiana that would make the contract "subject to the laws of another state."²⁷ It also makes void any

23. *See id.* § 32-8-3-16(b).

24. *See id.* § 32-8-3-16(c).

25. *Id.* § 32-8-3-18(a).

26. *Id.* § 32-8-3-16(b).

27. *Id.* § 32-8-3-17.

"forum selection" provision that would require "any litigation, arbitration, or other dispute resolution process on the contract [to] occur in another state."²⁸

A question that could arise with regard to section 17 is whether a construction contract that includes a forum selection clause requiring arbitration proceedings to be conducted outside Indiana renders the entire agreement to arbitrate void or only voids only the selection of an out-of-state site. The better position is that the agreement to arbitrate should remain enforceable and that only the attempt to require arbitration to occur out of state is void. This result is consistent with the language of the statute, which states that a "provision in a contract," and not the contract itself, is void if it requires "litigation, arbitration or other dispute resolution" to occur in another state.²⁹ Enforcement of the agreement to arbitrate at an in-state site, using Indiana's mechanic's lien statute as amended, would also be consistent with the general favor afforded to arbitration and mediation agreements.³⁰

The provisions of sections 16, 17, and 18 should be read together as means for closing loopholes that could be used to unsettle the balance of interests achieved by the 1999 amendments. Section 16 and 18 preserve the balance achieved by the abolition of the no-lien contract³¹ and of the relation back rule for contracts for the improvement of commercial real estate.³² Section 17 ensures that the underlying legal framework cannot be displaced by a clause that would require the substitution of a different framework that would define rights and adjust interests in a way that is different from the procedure resulting from the Indiana legislative process.³³

C. Summary of the Effect of the 1999 Amendments

Whether construction lenders or mechanics fare better under the 1999 amendments remains to be seen, but the balancing of competing interests they achieve provides a workable and predictable framework for realizing legitimate business expectations and for analyzing risks that benefits all concerned. Construction lenders are relieved of the uncertainty about the priority of their mortgages because they can rely on the date of recordation in the public records without fear that a subsequently recorded mechanic's lien will "relate back" to a prior date and assume a senior position.³⁴ Mechanic's lien holders preserve the right to file their liens, which right can no longer be displaced by a no-lien or

28. *Id.*

29. *Id.*

30. *See Northwestern Mut. Life Ins. Co. v. Stinnett*, 698 N.E.2d 339, 343 (Ind. Ct. App. 1998) ("It is well known that Indiana recognizes a strong policy favoring enforcement of arbitration agreements.") (citing *Chesterfield Management, Inc. v. Cook*, 655 N.E.2d 98, 102 (Ind. Ct. App. 1995)).

31. *See* IND. CODE § 32-8-3-16.

32. *See id.* § 32-8-3-8.

33. *See id.* § 32-8-3-17.

34. *See supra* text accompanying notes 17-18.

direct contract provision.³⁵ This right can be important in priority battles between mechanics and third party creditors, including a trustee in bankruptcy or debtor in possession. As an added benefit, the reliability of the recording system for real property is enhanced as a gap in the system has been filled, at least for projects to improve commercial real estate.³⁶ Unfortunately, the continued viability of the "relation back" rule for non-commercial real estate will continue to insert uncertainty into residential and utility property improvement projects. Accordingly, lenders for such projects will have to continue to use traditional means, such as the no-lien contract, to protect the priority of their mortgages.

D. Appellate Opinions Issued During 1999 Affecting Mechanic's Liens

Because the 1999 amendments to the mechanic's lien statute affect only contracts executed after July 1, 1999, construction contracts executed prior to that date will continue to be governed by the prior law. Additionally, the rules relating to mechanic's liens asserted against real estate used for residential and utility purposes were largely unchanged by the 1999 amendments. Thus, existing case law will continue to control in those areas. Finally, even with regard to commercial real estate, cases decided under the pre-amendment law will continue to be useful in cases for many issues, such as content and validity requirements of the notice of intention to hold a lien and revival and tacking of liens. For all of these reasons, appellate opinions issued in 1999 relating to mechanic's liens merit examination. Three mechanic's lien related opinions issued by the Indiana Court of Appeals in 1999 are *Mullis v. Brennan*,³⁷ *Abbey Villas Development Corp. v. Site Contractors, Inc.*,³⁸ and *Dinsmore v. Lake Electric Co.*³⁹

In *Mullis*,⁴⁰ the Brennans, as homeowners, entered into a written contract with a contractor, Richard Mullis, for the construction of an addition to their house. Even though Mullis apparently had previously created a corporation known as Mullis Building Corporation, he signed the contract as "Contractor" in his individual capacity.⁴¹ He also directed the Brennans to make progress payments to him as an individual, and he deposited such payments into his personal account and not into a separate account maintained by the corporation.⁴²

Problems with the quality of construction of the addition arose almost immediately. After several months of observing poor workmanship, the Brennans demanded that Mullis correct the problems, and they refused to pay any

35. See IND. CODE § 32-8-3-16 to -18.

36. See *id.*

37. 716 N.E.2d 58 (Ind. Ct. App. 1999).

38. 716 N.E.2d 91 (Ind. Ct. App. 1999), *trans. denied*, 2000 Ind. LEXIS 355 (Ind. Apr. 19, 2000).

39. 719 N.E.2d 1282 (Ind. Ct. App. 1999).

40. *Mullis*, 716 N.E.2d at 58.

41. *Id.* at 63.

42. See *id.* at 61.

further draws until the corrections were completed.⁴³ Mullis refused to perform any further work until he was paid. He ceased work and never completed the addition.

After Mullis walked off the project, a mechanic's lien was filed against the Brennans' real estate in the name of his corporation.⁴⁴ Mullis subsequently filed a complaint for breach of the construction contract and to foreclose on the mechanic's lien. The Brennans filed various counterclaims relating to Mullis' defective work. Following a two-day bench trial, the court entered judgment against Mullis on his complaint and in favor of the Brennans on their counterclaims.⁴⁵ The court of appeals affirmed the decision of the trial court and held that Mullis' lien was invalid.⁴⁶

Mullis contributes to the body of common law relating to mechanic's liens as it continues the practice of requiring strict compliance with the requirements of the mechanic's lien statute for purposes of determining the validity of the lien,⁴⁷ which stands in sharp contrast to the more forgiving, substantial compliance standard applied to enforcement of the lien.⁴⁸ Although one could conclude from the facts of the case that Mullis did not fully understand the difference between actions taken as an individual and actions taken as a representative of his corporation,⁴⁹ strict compliance with the statute was nevertheless required.⁵⁰ The court observed that the mechanic's lien statute dictates that the sworn statement of intention to hold the lien "must specifically set forth: . . . (2) the name and address of the claimant. . . ."⁵¹ The court further observed that "[b]ecause the mechanic's lien statute is in derogation of the common law, the provision of the statute 'relating to the creation, existence or persons entitled to the lien have historically been strictly construed.'"⁵² Accordingly, the appellate court concluded that "the designation of the wrong claimant must render the lien invalid."⁵³

43. *See id.*

44. *See id.* at 62.

45. *See id.*

46. *See id.* at 63.

47. *See, e.g., Abbey Villas Dev. Corp. v. Site Contractors, Inc.*, 716 N.E.2d 91, 98 (Ind. Ct. App. 1999), *trans. denied*, 2000 Ind. LEXIS 355 (Ind. Apr. 19, 2000); *Riddle v. Newton Crane Serv., Inc.*, 661 N.E.2d 6, 9 (Ind. Ct. App. 1996) (holding that Indiana's mechanic lien provisions should be narrowly construed) (citation omitted).

48. *See, e.g., Abbey Villas*, 716 N.E.2d at 98 ("[Once claimants prove they are within Indiana's mechanic lien statute,] the remedial provisions of the legislation should be liberally construed." (citing *Beneficial Finance Co. v. Wegmiller Bender Lumber Co.*, 402 N.E.2d 41, 45 (Ind. Ct. App. 1980))).

49. *See Mullis*, 716 N.E.2d at 63 n.2.

50. *See id.* at 63.

51. *Id.* (citing IND. CODE § 32-8-3-3(a) (1998)).

52. *Id.* (quoting *Garage Doors of Indianapolis, Inc. v. Morton*, 682 N.E.2d 1296, 1302 (Ind. Ct. App. 1997)).

53. *Id.* The *Mullis* case also discusses an implied duty of a contractor to perform his work

In *Dinsmore*,⁵⁴ the court of appeals, in determining the timeliness of a lien filing, considered the types of property that may be the subject of a valid mechanic's lien.⁵⁵ In this case, a contractor, Lake, provided electrical services to Northern Indiana Resources (NIR) to place an unused asphalt facility into operating order so that NIR could conduct its business of screening, bagging, and drying various products. NIR did not own the real estate from which its business was going to be operated, but occupied the real estate pursuant to a lease with the owner, Dinsmore Farms.⁵⁶

Lake provided electrical services to NIR from November 8, 1993 through March 16, 1994, for which Lake received only partial payment. Subsequently, Lake provided services in April 1995 when it built a control system, repaired a burner control, and fixed the "outside bagger system."⁵⁷ Finally, Lake provided repair services on the "outside bagger" from May 20 through May 22, 1995, after which no further work was performed. Lake filed its notice of intention to hold mechanic's lien on July 21, 1995, and included all work performed from November 8, 1993, through May 22, 1995.⁵⁸ The trial court, following a bench trial, entered a judgment in favor of Lake on its claim to foreclose the mechanic's lien.⁵⁹

The court of appeals reversed the judgment of the trial court.⁶⁰ Although the appellate court did not expressly refer to "strict construction" of the requirements for the creation of a valid mechanic's lien statute, it did focus its analysis on whether the "bagger" qualified under section 1 of the statute as property that could be subjected to a mechanic's lien.⁶¹ The appellate court noted that for Lake's lien to be valid, the bagger must come within the definition of "fixture" or of "other structures" contained in that section.⁶²

Based upon the portability of the bagger, its ability to be removed from the real estate without damage to any buildings or land, and NIR's intent to remove the bagger at the end of the lease term, the appellate court concluded that the bagger was either an item of personal property or a trade fixture, neither of which can be the subject of a mechanic's lien.⁶³ Having determined that the bagger was

"skillfully, carefully, diligently, and in a workmanlike manner," which duty is implied in "every contract for work or services," *Id.* at 64 (citations omitted), and discusses evaluating contractor liability under Indiana's Home Improvement Contracts Act, according to a "strict standard." *Id.* at 64-65 (citing IND. CODE § 24-5-11-1 to -14 (1998)).

54. See *Dinsmore v. Lake Elec. Co.*, 719 N.E.2d 1282 (Ind. Ct. App. 1999).

55. See *id.* at 1286.

56. See *id.* at 1284-85.

57. *Id.* at 1285.

58. See *id.*

59. See *id.*

60. See *id.* at 1289.

61. *Id.* at 1286-88.

62. *Id.* at 1286 (quoting IND. CODE § 32-8-3-1 (1998)).

63. See *id.* at 1288. The appellate court also concluded that the bagger did not qualify as an "other structure." Relying principally on four cases from the 1890's and upon the "words

not property capable of being subjected to a mechanic's lien, the court held that the lien filed by Lake on July 21, 1995, failed in its entirety because no qualifying work had performed within the previous sixty days.⁶⁴

*Abbey Villas*⁶⁵ examined two issues: 1) attempts by contractors to extend or revive mechanic's lien rights by providing additional work on a project after the work called for by the original contract had been completed, and 2) the effect of an overstatement of the amount owed on the validity of a mechanic's lien. In *Abbey Villas*, an engineer and an excavating contractor filed complaints to foreclose on mechanic's liens that each had filed against real estate owned by a developer of a residential subdivision. The trial court concluded that both liens were valid, and the developer appealed.⁶⁶ The court of appeals upheld the validity of the contractor's lien but disallowed the engineer's lien.⁶⁷

The developer and the engineer had entered into a contract pursuant to which the engineer was to provide specified services for a flat fee of \$15,000. The engineer subsequently provided additional services that it considered to be outside the original contract and billed the developer separately for them.⁶⁸ When the developer informed the engineer that he would not be paid for the additional services, the engineer ceased work on the project in January 1997. In March 1997, the developer's attorney contacted the engineer to inquire about the status of the project and to obtain additional services from him.⁶⁹ In response to this call, the engineer "dug out the plans" and began an investigation.⁷⁰ When it became clear that the developer still did not intend to pay any fees above the original contract amount, the engineer ended his review of the project and billed the developer for four hours of work.⁷¹

The engineer filed his mechanic's lien on May 9, 1997, and claimed as due all fees incurred for additional services performed on the project prior to January of that year. The trial court determined that the engineer's lien had been timely filed based on the billing for services rendered in March.⁷² On appeal two of the three judges on the panel voted to reverse the judgment in favor of the engineer

associated with 'other structures' in I.C. 32-8-3-1," the appellate court concluded that an important feature of an "other structure" is that it "is attached to or is a part of the land." *Id.* at 1287-88. Because the bagger was portable, it failed to meet this requirement. *See id.*

64. *See id.* Given its decision that the mechanic's lien was not timely filed, the appellate court did not address arguments raised by Dinsmore concerning whether work performed on the bagger was incidental and thus could not revive Lake's lien rights or whether Dinsmore, as owner of the real estate, consented to work performed at the request of NIR as lessee. *See id.*

65. *Abbey Villas Dev. Corp. v. Site Contractors, Inc.*, 716 N.E.2d 91 (Ind. Ct. App. 1999), *trans. denied*, 2000 Ind. LEXIS 355 (Ind. Apr. 19, 2000).

66. *See id.* at 95, 97.

67. *See id.* at 99, 101.

68. *See id.* at 94.

69. *See id.*

70. *Id.*

71. *See id.*

72. *See id.* at 95.

and to remanded the case to the trial court with instructions to enter new findings and to modify its judgment to reflect the majority's opinion that the engineer's mechanic's lien was not timely filed.⁷³

The court of appeals began its analysis of both the engineer's and the excavating contractor's claims by invoking a 1913 Indiana Supreme Court case for a statement of the purpose of the mechanic's lien statute.

The mechanics' lien laws of America, in general, reveal the underlying motive of justice and equity in dedicating, primarily, buildings and the land on which they are erected to the payment of the labor and materials incorporated, and which have given to them an increased value. The purpose is to promote justice and honesty, and to prevent the inequity of an owner enjoying the fruits of the labor and material furnished by others, without recompense.⁷⁴

The court also stated that the "core function of mechanic's lien statutes is to provide a method for contractors, subcontractors, laborers, and materialmen who have increased the value of a property owner's land but who have not been paid to obtain remuneration."⁷⁵ Finally, the court restated the different levels of scrutiny applied in determining the validity of a lien versus giving effect to the remedial purposes of a lien that has been determined to be valid.⁷⁶ Noting that mechanic's liens are in derogation of the common law, the court stated that the statute's provisions "must be strictly construed" and that "[l]ien claimants have the burden to prove that their claim is within the scope of the statute."⁷⁷ However, once a mechanic's lien has been determined to be valid, the "remedial provisions of the legislation should be liberally construed in order to accomplish the purposes of the statute."⁷⁸

With these policies and rules as a foundation, the court analyzed the work the engineer had performed for the developer. The engineer quit work on the developer's project in January 1997 because of the fee dispute.⁷⁹ The engineer filed his mechanic's lien on May 9, 1997. Thus the only way his lien could be valid as having been filed within sixty days of the date of last work performed is if the engineer's work in investigating the project file upon request of the developer's attorney could be considered to be a part of the parties' original contract and not merely incidental to it or done pursuant to a new agreement.⁸⁰ The court noted that "[a] mechanic's lien may appropriately be based upon work

73. *See id.* at 99.

74. *Id.* at 98 (quoting *Moore-Mansfield Constr. Co., Inc. v. Indianapolis N.C. & T. Ry. Co.*, 101 N.E. 296, 302 (Ind. 1913)).

75. *Id.* (citations omitted).

76. *See id.*

77. *Id.* (citations omitted).

78. *Id.* (citing *Haimbaugh Landscaping, Inc. v. Jegen*, 653 N.E.2d 95, 99 (Ind. Ct. App. 1995)).

79. *See id.*

80. *See id.*

which was actually called for under the contract or continuing employment relationship performed with the intention of completing the job,"⁸¹ but "[t]he right to such a lien cannot be revived through the performance of some act incidental to the work which is not done with the intention of completing the job."⁸² The court concluded that the engineer had previously fulfilled his obligations under the original contract and that the file examination done in March was not performed in connection with completing the original contract and was merely incidental to it.⁸³ Accordingly, the court found, as a matter of law, that the engineer's mechanic's lien had been filed outside the statutory sixty-day period.⁸⁴

The contractor's mechanic's lien claim raised different issues, specifically: 1) whether the contractor's failure to perform as agreed precluded him from asserting a lien,⁸⁵ and 2) whether an overstatement of the amount owed invalidated that lien.⁸⁶ The contract between the developer and the contractor required the contractor to complete work on the project by specified dates. The contractor failed to meet these deadlines, and the developer paid the contractor only \$70,000 out of the \$200,000 worth of invoices that had been submitted for payment. The developer subsequently ordered the contractor off the job, by which time the contractor had completed seventy percent of its work.⁸⁷ The contractor filed a mechanic's lien against the developer's real estate in the amount of \$166,510.09. It was later discovered that this lien was overstated by more than \$38,000.⁸⁸

The first issue the trial court had to consider with regard to the contractor's claim was whether the contractor's failure to complete work in a timely manner constituted a breach of the construction contract that would bar recovery on his lien.⁸⁹ The trial court found that the developer was the first party to breach the contract by failing to pay the contractor's invoices, and therefore the developer was liable for the reasonable value of the services rendered by the contractor.⁹⁰

The court then examined the effect of the contractor's overstatement of the amount owed on the validity of the lien.⁹¹ The developer argued that the overstatement rendered the lien void. His argument was based on a construction of the mechanic's lien statute which maintains that a failure to complete the notice of intention accurately is fatal to the lien right, a construction that was

81. *Id.* (citing *Miller Monuments, Inc. v. Asbestos Insulating & Roofing Co.*, 185 N.E.2d 533, 535 (Ind. App. 1962)).

82. *Id.* (citing *Gooch v. Hiatt*, 337 N.E.2d 585, 588 (Ind. App. 1975)).

83. *See id.* at 99.

84. *See id.*

85. *See id.* at 101-02.

86. *See id.* at 100-01.

87. *See id.* at 102.

88. *See id.*

89. *See id.* at 97.

90. *See id.*

91. *See id.* at 101.

applied to the element of the identity of the lien holder in *Mullis*.⁹² Instead, the court used a more lenient standard that permitted an inquiry into the cause of the overstatement.⁹³ The court held that an overstatement of the amount of a mechanic's lien that is done intentionally or through culpable negligence will invalidate the whole lien but an overstatement that results from mistake will not render the lien void in the absence of fraud or prejudice to the land owner.⁹⁴ Because the facts indicated that the contractor's overstatement was the result of inadvertent clerical error and had been reported to the developer, the court held that such overstatement did not affect the validity of the lien.⁹⁵

Mullis, *Abbey Villas*, and *Dinsmore* demonstrate some of the many mechanic's lien issues that are not affected by the 1999 amendments to the mechanic's lien statute. Opinions deciding such issues continue to be viable.

II. REAL ESTATE AGENCY RELATIONSHIPS STATUTE

In another significant act, the Indiana Legislature amended that part of Title 25 governing real estate agency relationships.⁹⁶ In so doing the legislature altered at least thirty years of custom and practice in the real estate sales industry⁹⁷ by redefining the relationships among parties to a sale or lease of real estate by eliminating subagency. In so doing, the legislature also dramatically altered the duties owed by real estate licensees to sellers and buyers⁹⁸ by actually reversing the duties owed in many instances. Unfortunately, the restructured agency relationships only partially render a licensee's duties more certain. Plentiful opportunities for claims against licensees remain under the amended statute, and in some instances new opportunities may be created by overbroad or imprecisely defined terms added by the amendments themselves.

A. Pre-Amendment Practice

Prior to the 1999 amendments, a seller of real estate typically retained a real estate licensee to act as his agent to find a suitable buyer. The licensee and the seller would memorialize their relationship in a listing agreement, which would include a definition of the circumstances under which the licensee's commission would be earned.⁹⁹ This licensee, referred to as the "listing agent,"

92. See *Mullis v. Brennan*, 716 N.E.2d 58, 63 (Ind. Ct. App. 1999).

93. See *Abbey Villas*, 716 N.E.2d at 101.

94. See *id.*

95. See *id.*

96. See IND. CODE § 25-34.1-10-0.5 to -34.1-10-17 (1998).

97. The concept of the unilateral offer of subagency has been traced to the early 1970s. See Sandra Nelson, Note, *The Illinois Real Estate "Designated Agency Amendment": A Minefield for Brokers*, 27 J. MARSHALL L. REV. 953, 961-62 (1994).

98. The amended sections dealing with real estate licensees include lessors and lessees as well as sellers and buyers. For convenience only the terms seller and buyer will be used, but they should be understood to include lessors and lessees as well.

99. See IND. CODE § 32-2-2-1 (1998). This statute operates as a statute of frauds for real

would then place information about the real estate with a multiple listing service, thereby bringing the real estate to the attention of all other member licensees in the hope that one of them might locate a buyer.

At the other end of a typical transaction, a potential buyer would contact a licensee and state that he was interested in locating and purchasing a parcel of real estate. If this licensee was not the listing agent for any real estate meeting the buyer's needs, he would consult the multiple listing service for properties listed by other licensees. If a suitable parcel was located and purchased, the licensee would participate in the closing as the "selling agent."

Such a procedure, although efficient in bringing about sales of real estate, raised important legal questions concerning the licensees' rights and obligations to each other and to the seller and buyer. One such problem related to the payment of commissions to the selling agent. Listing agreements between the seller and the listing agent provided for the payment of a commission, usually stated as a percentage of the selling price, upon the occurrence of certain stated events. Thus, the listing agent's right to collect the commission was protected by contract. The selling agent, however, enjoyed no such privity of contract with the seller and had no direct basis to enforce payment of a commission. It was also extremely unlikely that the selling agent had any contractual agreement with the buyer to pay a commission akin to a "finder's fee" as buyers considered the commission to be the seller's obligation and likely to be already factored into the purchase price. However, in the absence of the potential for earning a commission, there was no incentive for a licensee to find buyers for any properties other than the ones on which he was the listing agent.

This conundrum was solved by the concept of subagency. As a condition of placing a property with a multiple listing service, where its chances of sale are greatly increased, every licensee agreed to make every other licensee his subagent. This mandatory offer of subagency was unilateral and was presumed to be accepted by the second licensee upon showing the real estate to a potential buyer. Through this procedure, the seller's contractual obligation to pay a commission to the listing agent passed through to the selling agent.

Subagency also carried with it, however, serious issues concerning the fiduciary duties owed by the licensees to the parties under the common law of agency, and there was widespread misunderstanding of those duties by buyers. When a potential buyer approached a licensee, that buyer sought assistance in buying a parcel of real estate. The buyer relied on the licensee to search the multiple listing service for appropriate properties, to accompany him to inspect available properties, and if an appropriate property was located to assist him in completing offers to purchase and counteroffers. A close working relationship often developed, and most buyers viewed the licensee as his agent, as acting with his best interests at heart, and as owing duties to him.¹⁰⁰ Unfortunately, the

estate sales commissions by providing that no agreement for the payment of money for the finding of a purchaser of real estate is valid unless that agreement is set forth in a writing. *See id.*

100. According to a Federal Trade Commission survey conducted in 1983, 72% of all residential real estate buyers thought that they were represented by the selling agent. Even when

buyers' view was wrong. According to the principle of subagency, the selling agent was a subagent of the listing agent and both owed fiduciary duties to the seller. The buyer was represented by no one.

The common law of agency imposes a number of duties on an agent in favor of his principal.¹⁰¹ Perhaps chief among these is the duty of loyalty, which encompasses both a duty to avoid conflicts of interest and a duty to maintain confidentiality for any information acquired from the principal during the term of the agency. Under the principle of subagency both the listing agent and the selling agent owed these duties to the seller. Neither of them owed any of the common law duties to the buyer. Thus, for example, under subagency it would be improper for the selling agent to negotiate for terms of sale advantageous to the buyer at the expense of the seller, even though the buyer may be "relying" on the selling agent's expertise. Similarly, although it would be improper for a selling agent to divulge to the buyer information obtained from the seller, there would be no agency law violation if the selling agent told the listing agent information obtained from the buyer.

This situation called out for a remedy for at least two reasons. First, consumer groups objected to the lack of representation for buyers and to the misunderstanding under which most buyers approached real estate transactions. Second, licensees desired a clarification of their relationships and duties, with the goal that such clarification would result in a limitation of potential legal liability that could arise from misunderstood agency relationships. It is these twin goals that the 1999 amendments attempt to achieve.

B. The 1999 Amendments to the Real Estate Agency Relationships Statute

Perhaps the feature of Senate Enrolled Act No. 358¹⁰² (which became effective on July 1, 1999) that one first notices is the number of amended or new

only one licensee was involved in the transaction, 31% of buyers thought that licensee represented them and not the seller. Additionally, 82% of sellers thought the selling agent represented the buyer. See Roy T. Black, *Proposed Alternatives to Traditional Real Property Agency: Restructuring the Brokerage Relationship*, 22 REAL ESTATE L.J. 201, 201-02 (1994) (citation omitted).

101. These duties include: the duty to obey instructions, the duty to act with care and skill, the duty to notify the principal of material information relevant to the principal's goal, and the duty to account for anything of value received by the agent on the principal's behalf during the term of the agency. See, e.g., *Prudential Ins. Co. of Am. v. Crouch*, 606 F. Supp. 464, 471 (S.D. Ind. 1985) ("[E]very agent owes a fiduciary duty to his principal to act with good faith and loyalty in furtherance of the principal's interests."), *aff'd*, 796 F.2d 477 (7th Cir. 1986) (mem.); *Potts v. Review Bd. of Ind. Employment Sec. Div.*, 475 N.E.2d 708, 711 (Ind. Ct. App. 1985) ("[A]n agent is subject to a duty to act solely for the benefit of the principal. An agent may not place himself in a position wherein his own interests are potentially antagonistic to those of his principal.") (citations omitted).

102. Act of May 3, 1999, Pub. L. 130-1999, 1999 Ind. Act 696 (codified as amended at IND. CODE § 25-34.1-10-1 (Supp. 1999)).

sections of the Act devoted to defining terms. New definitions are provided for "agency relationship,"¹⁰³ "broker,"¹⁰⁴ "client,"¹⁰⁵ "customer,"¹⁰⁶ "in-house agency relationship,"¹⁰⁷ "licensee,"¹⁰⁸ "limited agent,"¹⁰⁹ "managing broker,"¹¹⁰ "principal broker,"¹¹¹ and "subagent."¹¹² Such extensive redefinition was required because the amendments alter the familiar landscape of real estate agency law by eliminating the former organizing principle of subagency and by substituting newly defined relationships and duties between licensees and sellers and buyers.

This feat is accomplished by amendments to sections 17 and 9.5 of the Act. Section 17 states that "[a] licensee may not make an offer of subagency through a multiple listing service or other information source, or agree to appoint, cooperate with, compensate, or otherwise associate with a subagent in a real estate transaction."¹¹³ In place of subagency, section 9.5 provides that "[a] licensee has an agency relationship with, and is representing, the individual with whom the licensee is working"¹¹⁴ Thus, agency relationships are now defined by working relationship, and the statutory goal of having the law of real estate agency relationship match the legitimate expectations of the parties, especially buyers, should be accomplished.

At the same time the amendments preserve the ability of the licensee assisting the buyer to receive compensation in the absence of subagency by providing that "[t]he elimination of subagency by this section is not intended to limit the rights of a licensee to cooperate with, compensate, or otherwise associate with another licensee who is not acting on behalf of a client."¹¹⁵ As part of the listing agreement, the licensee working with the seller will obtain permission to compensate the buyer's licensee. That licensee can thus be paid without the creation of any of the duties that accompanied subagency.

Evaluating the success of the 1999 amendments in achieving the second goal

103. IND. CODE § 25-34.1-10-0.5 (Supp. 1999).

104. *Id.* § 25-34.1-10-1.

105. *Id.* § 25-34.1-10-5.

106. *Id.* § 25-34.1-10-6.

107. *Id.* § 25-34.1-10-6.5.

108. *Id.* § 25-34.1-10-6.8. "A 'licensee' means an individual or entity issued a salesperson's or broker's real estate license by the Indiana real estate commission." *Id.*

109. *Id.* § 25-34.1-10-7.

110. *Id.* § 25-34.1-10-7.5.

111. *Id.* § 25-34.1-10-7.8.

112. *Id.* § 25-34.1-10-9.

113. *Id.* § 25-34.1-10-17. The only instance in which "subagency" remains possible is where one broker is engaged to act for another broker in performing brokerage services for a single client. *See id.* § 25-34.1-10-9. Under these limited circumstances, there is no concern about a buyer misconstruing the loyalties of the subagent.

114. *Id.* § 25-34.1-10-9.5. This presumption can be altered by agreement and does not apply where the licensee "is merely assisting the individual as a customer." *Id.*

115. *Id.* § 25-34.1-10-17.

of redefining agency duties with the goal of limiting opportunities for licensee liability is more problematic. The effectiveness of the restructured relationships in eliminating the agency duty problems that formerly accompanied subagency is best examined in the context of three common transactional patterns: 1) sales involving licensees affiliated with different brokerage houses; 2) sales involving two licensees affiliated with a single brokerage house; and 3) sales involving only one licensee within a single brokerage house.

1. Duties Owed by a Licensee in Multiple Brokerage House Transactions.— Having based the roles of principal and agent on the basis of working relationship, the amendments then define the nature and scope of the duties owed by a licensee to a client. These duties can be characterized as acts that a licensee must do, acts that he must not do, and acts that he is permitted to do.

The duties and obligations that must be observed by a licensee who represents a seller are set forth in section 10(a), which duties are: “(1) To fulfill the terms of the agency relationship made with the seller or landlord; (2) To disclose the nature of the agency relationship with the seller . . . and redefine and redisclose if the relationship changes; [and] (3) To promote the interests of the seller. . . .”¹¹⁶ It is in the last category where the specific duties are identified. “Promoting the interests of the seller” includes : 1) seeking a price and sales contract terms satisfactory to the seller;¹¹⁷ 2) presenting all offers to purchase to the seller immediately upon receipt;¹¹⁸ 3) disclosing to the seller “adverse material facts or risks actually known by the licensee concerning the real estate transaction”;¹¹⁹ 4) advising the seller “to obtain expert advice concerning material matters that are beyond the licensee’s expertise”;¹²⁰ 5) timely accounting for all money and property received from the seller;¹²¹ 6) exercising reasonable care and skill;¹²² and 7) complying with “the requirements of this chapter and all applicable federal, state, and local laws, rules, and regulations, including fair housing and civil rights statutes, rules, and regulations.”¹²³

The actions a licensee must not take are identified in section 10(b). A licensee representing a seller is prohibited from disclosing to a potential buyer: 1) that the seller will accept less than the asking price or make other contract concessions;¹²⁴ 2) the seller’s motivation to sell the real estate;¹²⁵ and 3) any “material or confidential” information about the seller.¹²⁶

116. *Id.* § 25-34.1-10-10(a).

117. *Id.* § 25-34.1-10-10(a)(3)(A).

118. *See id.* § 25-34.1-10-10(a)(3)(B).

119. *Id.* § 25-34.1-10-10(a)(3)(C).

120. *Id.* § 25-34.1-10-10(a)(3)(D).

121. *See id.* § 25-34.1-10-10(a)(3)(E).

122. *See id.* § 25-34.1-10-10(a)(3)(F).

123. *Id.* § 25-34.1-10-10(a)(3)(G).

124. *See id.* § 25-34.1-10-10(b)(1).

125. *See id.* § 25-34.1-10-10(B)(2).

126. *Id.* § 25-34.1-10-10(b)(3). Material or confidential information can be revealed by a licensee if disclosure is required by law or where failure to disclose would constitute fraud or

Section 10(c) further defines the duties of a licensee representing a seller by stating that he owes "no duties or obligations" to a prospective buyer except to treat the buyer honestly and not to knowingly give false information,¹²⁷ and to disclose to a prospective buyer "adverse material facts or risks actually know by the licensee concerning the physical condition of the property and facts required by statute or regulation to be disclosed and that could not be discovered by a reasonable and timely inspection of the property by the buyer"¹²⁸ This latter duty is limited by the undiscoverability requirement and by subsequent language that exempts the seller's licensee from any duty to conduct an inspection for the buyer or to verify the accuracy of any written or oral statements made by the seller.¹²⁹ The amendments also provide that "[a] cause of action does not arise against a licensee for disclosing information in compliance with this section."¹³⁰

Finally, the acts that the seller's licensee is permitted to do are identified in section 10(e). A seller's licensee may "show alternative properties not owned by the seller . . . to a prospective buyer . . . and may list competing properties for sale . . . without breaching any duty or obligations to the seller"¹³¹ He may also provide to a buyer "services in the ordinary course of a real estate transaction and any similar services that do not violate the terms of the agency relationship"¹³²

Substantially identical provisions concerning the acts that a licensee working with a buyer is required to take, is prohibited from taking and is permitted to take are contained in section 11.¹³³ The only differences between the duties identified in the two sections are those necessary to track the differences between activities of a seller and a buyer. For example, section 10(d) speaks to a licensee's duty to verify statements made by the seller,¹³⁴ while section 11(d) speaks to a licensee's duty to make disclosures about the buyer's financial ability to perform the terms of an offer.¹³⁵

If the goal of the amendments was to identify a licensee's duties to his client and thereby limit the licensee's exposure to claims arising from misunderstandings about relationships, specifying the substantive nature of those duties is only part of the chore. The scope of those duties must also be identified by specifying the events that trigger the creation of a licensee's agency duties and their termination. The amendments achieve this goal in section 14 of the amended statute.

The 1999 amendments contain no formal requirements, including the

dishonest dealing. *See id.* § 10(b)(3).

127. *Id.* § 25-34.1-10-10(c).

128. *Id.* § 25-34.1-10-10(d).

129. *See id.*

130. *Id.*

131. *Id.* § 25-34.1-10-10(e)(1).

132. *Id.* § 25-34.1-10-10(e)2).

133. *See id.* § 25-34.1-10-11.

134. *See id.* § 25-34.1-10-10(d).

135. *See id.* § 25-34.1-10-11(d).

necessity of a writing,¹³⁶ for the creation of an agency relationship. Instead, section 14 provides that “[t]he duties and obligations set forth in this chapter begin at the time the licensee enters into an agency relationship with a party to a real estate transaction”¹³⁷ An agency relationship is created when a licensee works with a client,¹³⁸ and it is with the beginning of the working relationship that the licensee’s agency duties begin.

Section 14 provides that the licensee’s agency duties continue “until the agency terminates.”¹³⁹ If the agency goal is not fulfilled, “the agency relationship ends at the earlier of: (1) a date of expiration agreed upon by the parties; or (2) a termination of the relationship by the parties.”¹⁴⁰ Unless otherwise agreed, “a licensee representing a seller, landlord, buyer, or tenant owes no further duties or obligations after termination, expiration, or completion of the agency relationship”¹⁴¹ Despite this sweeping denial of the existence of continuing duties following termination of the agency relationship, the Act follows common law rules in providing that certain duties do survive termination of the agency relationship. These are the duties to “account[] for all money and property received during the agency relationship”¹⁴² and to “keep[] confidential all information received during the course of the agency relationship that was made confidential by request or instructions from the client,”¹⁴³ except where such disclosure is required by law, is made with the consent of the client or became public from a source other than the licensee.¹⁴⁴

2. Licensee Duties in In-House Agency Relationships.—Sales of real estate involving licensees from separate brokerage houses are common, but also significant are sales involving two licensees both employed by the same brokerage house. Under the former subagency rules, once a licensee executed a listing agreement with a seller, that licensee, the company for which he worked

136. But see Indiana Code section 32-2-2-1 (1998) concerning the requirement of a writing as a prerequisite for enforcing an agreement to pay a commission for locating a buyer of real estate. As a practical matter, this writing requirement will in almost all cases result in the memorialization of the start of the agency between a seller the licensee working with him.

137. *Id.* § 25-34.1-10-14(a).

138. *See id.* § 25-34.1-10-9.5.

139. *Id.* § 25-34.1-10-14 (a).

140. *Id.* § 25-34.1-10-14(b). This sub-section implies, but does not state, that an agency relationship is also terminated by the accomplishment of the goal of the agency relationship. By the use of the words “by the parties” in subsection (b)(2), instead of by “either of the parties,” the Act appears not to acknowledge the rule that either party to an agency relationship has the power—but maybe not the legal right—to terminate the agency at any time. Pursuant to the terms of the listing agreement containing an exclusive right to sell clause, a seller may be able to terminate the agreement but still will be obligated to pay a commission if the property is subsequently sold to a buyer who became aware of it through the services of any realtor during the term of the agency.

141. *Id.* § 25-34.1-10-14(c).

142. *Id.* § 25-34.1-10-14(c)(1).

143. *Id.* § 25-34.1-10-14(c)(2).

144. *See id.* § 25-34.1-10-14(c)(2)(A)-(C).

and all other licensees working for that company became agents of the seller. Such a result created no special difficulties for the firm or its licensees since agency duties owed by all licensees ran exclusively to the seller, but such automatic and all-inclusive imputation of agency cannot work under a statute that imposes duties based on working relationships with sellers and buyers. In markets dominated by a few brokerage houses with dozens or scores of licensees, it is unavoidable that a licensee will end up working with a buyer who is interested in purchasing real estate owned by a seller who is working with a licensee in the same firm.

The Act addresses this problem by defining such a situation as an "in-house agency relationship"¹⁴⁵ and by providing that:

An individual licensee affiliated with a principal broker represents only the client with which the licensee is working in an in-house agency relationship. A client represented by an individual licensee affiliated with a principal broker is represented only by that licensee to the exclusion of all other licensees. A principal or managing broker does not represent any party in such transactions unless the principal or managing broker has an agency relationship to personally represent a client.¹⁴⁶

This rule restricting licensee representation to a specific client is necessary because, unlike sales involving multiple brokerage houses, sales involving in-house agency relationships must preclude the imputation of an agency relationship and agency duties from one licensee to the company any thence to other licensees in it. This goal is achieved among licensees by declaring that agency relationships exist between a licensee and a client "to the exclusion" of all other licensees in the firm. It is achieved for the principal or managing broker of the firm by conferring a type of neutrality under which that broker represents no one other than his specific client. Firewalls are thus established between licensees, and agency duties stop at those walls.

The firewalls established by the amendments also serve to preclude the imputation of knowledge among the brokers and licensees. Section 12.5(e) provides that "[i]n all in-house agency relationships, a principal broker, managing broker, and an individual licensee possess only actual knowledge and information."¹⁴⁷ Without this provision, in-house agency relationships would raise insurmountable issues relating to the competing duties to maintain confidentiality and duties to disclose information imputed to a licensee.

To insure that the theoretical separation of licensees is maintained in practice and that one licensee does not defeat the statutory scheme by imparting actual

145. An "in-house agency relationship" is defined as "an agency relationship involving two (2) or more clients who are represented by different licensees within the same real estate firm." *Id.* § 25-34.1-10-6.5.

146. *Id.* § 25-34.1-10-12.5(a). The terms "principal broker" and "managing broker" are defined at sections 25-34.1-10-7.8 and -7.5, respectively.

147. *Id.* § 25-34.1-10-12(e).

knowledge to another licensee within the firm, section 12.5(d) provides that “[a] principal broker, managing broker, and any affiliated licensee shall take reasonable and necessary care to protect any material or confidential information disclosed by a client to the client’s in-house agent.”¹⁴⁸ The amendments further provide that “[a] licensee representing a client in an in-house agency relationship owes the client duties and obligations set forth in this chapter and shall not disclose material or confidential information obtained from the client to other licensees”¹⁴⁹ In recognition of the neutrality bestowed on brokers, a licensee is permitted to disclose material or confidential information obtained from a client “for the purpose of seeking advice or assistance for the client’s benefit.”¹⁵⁰ Maintaining the integrity of the firewalls can prove to be difficult as there are numerous ways in which information can pass across it.

With the elimination of imputed agency and of imputed knowledge and with the construction of firewalls within a brokerage firm to maintain the separation, the determination of licensee duties based upon working relationship is preserved even in in-house agency relationships. Still more is required when there is only one licensee involved in the transaction, and he is working with both the buyer and the seller.

3. *Agency Duties in Limited Agency Transactions.*—Presumptions against imputation of agency relationships and knowledge and the construction of firewalls may be effective in in-house agency relationships where two licensees are involved, but they are inapplicable in a transaction involving only one licensee working with and for both the seller and buyer. A licensee involved in such a transaction is defined as a limited agent. A limited agent is a licensee “who, with the written and informed consent of all parties to a real estate transaction, is engaged by both the seller and the buyer.”¹⁵¹

The written and informed consent requirement is presumed to be met if, at the time of entering into an agency relationship with the licensee, each party signs a document that contains the information prescribed by section 12(a).¹⁵² With regard to agency duties owed by the licensee to the seller and buyer in a limited agency transaction, the most important disclosure is the one that informs the parties that “in serving as a limited agent, the licensee represents parties whose interests are different or even adverse.”¹⁵³

The prohibitions placed against disclosure of information by a licensee in a limited agency relationship are severe and include essentially all of the prohibitions of sections 10 and 11 plus add the additional prohibition that the licensee shall not disclose any other term “that would create a contractual

148. *Id.* § 25-34.1-10-12.5(d).

149. *Id.* § 25-34.1-10-12.5(c).

150. *Id.*

151. *Id.* § 24-4.6-2.1-1.5 (Supp. 1999). This definition is also used in sections 25-34.1-10-12(a) and -12.5(b). *See id.* § 25-34.1-10-12.

152. *See id.* § 25-34.1-10-12(a)(1)-(6).

153. *Id.* § 25-34.1-10-12(a)(2).

advantage for one (1) party over another party.”¹⁵⁴ The safe harbors available for a licensee in a limited agency relationship are narrow. Unless he has obtained the informed and written consent of his client, a licensee is only permitted to “disclose and provide to both the seller and buyer property information, including listed and sold properties available through a multiple listing service or other information source.”¹⁵⁵ In the absence of this safe harbor, providing such information could be seen as giving an advantage to a buyer, for example, by providing him with sales information including the sale prices for comparable properties, which the buyer could then use to negotiate a purchase price lower than that sought by the seller. Finally, section 12(c) insulates the licensee from causes of action for “disclosing or failing to disclose information in compliance with this section”¹⁵⁶ Given the limited actions a licensee in a limited agency relationship can take for either seller or buyer, the usefulness of such representation to the parties is highly questionable. Nevertheless, the amendments affecting such representation address concerns about buyer misunderstanding of agency relationships by requiring informed and written consent and address licensee concerns about liability by clearly defining the licensee’s relationships and duties.

*C. Broker and Licensee Liability Issues Remaining
After the 1999 Amendments*

No matter how well designed the agency relationship statute may be, liability can obviously result if the broker fails to implement the new procedures and firewalls or if a licensee fails to conduct himself in the required manner. Memoranda left in open view and overheard telephone conversations are but two examples of ways in which the firewalls can be breached. Even assuming an embrace of the statutory requirements by a licensee, undefined, inadequately defined, and overinclusive terms in the amendments themselves may provide a basis for litigation concerning a licensee’s actions. At least eight terms or clauses appear suitable for use by creative litigants.

One issue created by the definitions supplied in the statute centers on the difference between a “client” and a “customer.” A client is defined as a person who has entered into an agency relationship with a licensee.¹⁵⁷ The definition of an agency relationship, however, is wonderfully circular as that term means a relationship in which a licensee represents a client.¹⁵⁸ The circularity continues as a customer is defined as a person who is provided services in the ordinary course of business by a licensee but who is not a client.¹⁵⁹

To make matters even more difficult, the amendments provide no definition

154. *Id.* § 25-34.1-10-12(a)(3)(E).

155. *Id.* § 25-34.1-10-12(b).

156. *Id.* § 25-34.1-10-12(c).

157. *See id.* § 25-34.1-10-5.

158. *See id.* § 25-34.1-10-9.5.

159. *See id.* § 25-34.1-10-6.

at all for “services in the ordinary course of business.” A list of illustrative acts, including “preparing offers to purchase or lease and communicating the offers to the seller or landlord, arranging for lenders, attorneys, inspectors, insurance agents, [and] surveyors”¹⁶⁰ was deleted by the 1999 amendments. How are courts to construe this deletion? Does it indicate that these are not the types of activities the legislature intended to be within the scope of the term “ordinary course of business”? If those are not the intended acts, what did the legislature intend them to be?

Differentiating between a client and a customer is important because the licensee’s duties are determined by the relationship. A licensee owes the statutory duties to a client but not to a customer. With such an important issue at stake, the legislature should have provided better guidance.

A second and related issue tied to the definition of client is “with whom the licensee is working.”¹⁶¹ How is a licensee, or a court, to know when the “working” relationship, and the agency duties, begin? The statute merely provides that, in the absence of a written agreement to the contrary or mere assistance to a “customer,” an agency relationship arises automatically when there is a “working” relationship. A written document is required by the Indiana Code for a promise to pay a real estate commission to be enforceable;¹⁶² therefore, the working relationship between the seller and a licensee can be traced to the execution of the listing agreement. There is, however, no similar requirement for licensees who work with buyers, and no document memorializing the representation is currently in wide-spread practice. Even if use of a buyer representation form becomes widespread, some buyers may be reluctant to sign it upon first meeting a licensee. How then will a licensee know when a qualifying working relationship has begun and corresponding duties have arisen? Section 14(a) provides no assistance as it states only that “[t]he duties and obligations set forth in this chapter begin at the time the licensee enters into an agency relationship,”¹⁶³ but provides no definition for “entering.”¹⁶⁴ The answer forthcoming from licensees representing buyers is likely to be that there is no precise way to determine the time when contacts with a prospective buyer blossom into a “working relationship” and that the best they can do is operate on faith. Anecdotal stories can already be heard describing instances in which a licensee considered a working relationship to exist but the buyer actually closed on the sale of a property with another licensee, perhaps a friend, who had not previously been involved in showing that property. If one of the goals of the 1999 amendments was to define clearly the agency relationships, more clarity is needed in defining their commencement.

Third, the statute requires a licensee representing a seller to disclose to the

160. *Id.* § 34.1-10-10(e)(z) (1998), amended by § 25-34.1-10-10(e) (Supp. 1999).

161. *Id.* 25-34.1-10-9.5 (Supp. 1999).

162. *See id.* § 32-2-2-1 (1998).

163. *Id.* § 25-34.1-10-14(a) (Supp. 1999).

164. Section 14 does a better job defining the events that will serve to terminate an agency relationship. *See id.* § 25-34.1-10-14(b); text of *supra* note 140.

seller "adverse material facts or risks" actually known to the licensee concerning the "real estate transaction."¹⁶⁵ Differences of opinion can develop between a seller and a licensee with regard to adversity and materiality, neither of which are further defined. Additionally, what is the difference between a fact and a risk requiring disclosure? This question is made more difficult for licensees as the facts or risks that must be disclosed relate to the "real estate transaction" as opposed to the condition of the real estate itself.

Fourth, the statute requires the seller's licensee to advise the seller to obtain expert advice concerning matters that are "beyond the licensee's expertise."¹⁶⁶ Many matters relating to construction methods and building code compliance, for example, may be beyond the expertise of a licensee. Other matters may even be outside his knowledge and thus will go unrecognized. How is a licensee to know that he should recommend that a seller obtain expert advice about matters beyond the licensee's ken? A prophylactic warning by the licensee, "There may be matters relating to this property and to this transaction that are beyond my expertise, so retain an expert" is unhelpful and absurd. The absence of any reasonableness qualifier on the extent of the licensee's expertise, however, makes it difficult for a licensee to know when to give the required advice.

Fifth is the requirement that all licensees, whether representing sellers or buyers, must "comply[] with the requirements of this chapter *and all applicable federal, state, and local laws, rules, and regulations, including fair housing and civil rights statutes, rules, and regulations.*"¹⁶⁷ Such a blanket importation of an unknown number of laws, rules, and regulations from federal, state, and local authorities requires licensees to possess an impossible amount of legal knowledge. Additionally, if a licensee takes an actions that violates an applicable law, did the legislature intend to make that same act also a violation of Title 25?

Sixth, the rules governing maintenance of confidentiality in sections 10 and 11 refer to "material" *or* "confidential" information.¹⁶⁸ Does this mean that a disclosure of material information will provide a cause of action against the licensee even if that information was not confidential? The statute gives no guidance in evaluating "materiality." The amendments provide that material or confidential information can be disclosed by a licensee if failure to disclose would result in "dishonest dealing."¹⁶⁹ How is a court to determine the scope of this term?¹⁷⁰ Undefined terms will require determination on a case-by-case basis, which hardly provides the certainty licensees sought in defining the scope of their liability.

Seventh, in a limited agency transaction, the licensee is prohibited from

165. *Id.* § 25-34.1-10-10(a)(3)(C).

166. *Id.* §§ 25-34.1-10-10(a)(3)(D), -11(a)(3)(G).

167. *Id.* § 25-34.1-10-10(a)(3)(G) (emphasis added).

168. *Id.* §§ 25-34.1-10-10(b)(3), -10-11(b)(3).

169. *Id.* §§ 25-34.1-10-10(b)(3), -10-11(b)(3).

170. "Honesty" is also required in dealings between the seller's licensee and the buyer in section 10(b)(3) and between the buyer's licensee and the seller in section 11(c). *Id.* §§ 25-34.1-10-10(b)(3), -10-11(c).

disclosing any term that would “create a contractual advantage” for one party over the other.¹⁷¹ It can be argued with some force that practically any information provided to one party can confer some advantage on the other party. Lack of guidance on this issue should make licensees in such transactions even more cautious about disclosing any information to either buyer or seller than they must already be by virtue of their representation of parties whose interests are already “different or even adverse.”

Eighth, the amendments seek to contain the theories on which clients might assert claims against licensees by providing that the statute’s provisions displace common law agency principles.¹⁷² Specifically, the statute states that “[t]he duties and obligations of a licensee set forth in this chapter supersede any fiduciary duties of a licensee to a party based on common law principles of agency to the extent that those common law fiduciary duties are inconsistent with the duties and obligations set forth in this chapter.”¹⁷³ The statute leaves open room for a court to impose liability on common law principles of agency that are not inconsistent with the statute but instead support, supplement, or explain it. Exactly which common law principles might remain applicable will not be known until the courts tell us which are consistent and which are not. Also, the statute attempts to exclude only theories based on common law agency principles.¹⁷⁴ There is no attempt to exclude common law tort principles. Even in the days of subagency, licensees representing sellers had been held liable to buyers under negligence principles.¹⁷⁵ Sections 10(a)(3)(G) and 11(a)(3)(F) specifically provide for licensee liability for failing to “exercise reasonable care and skill,” which is a tort-based standard.¹⁷⁶

D. Conclusions About Real Estate Agency Relationships Statute Amendments

The 1999 amendments are an improvement over the interim agency disclosure requirements enacted in 1994. Disclosure of available agency relationships did little to cure buyer confusion about the absence of agency duties owed to him and equally little to clarify the nature and scope of duties expected of licensees. The 1999 amendments provide for buyer representation based on working relationship and abolish the principle of subagency. The amendments are less successful at clearly defining a licensee’s duties. Although they are an improvement over pre-amendment rules, the statute leaves a number of issues open for future litigation. Resolution of such open issues will have to come from judicial decisions arising from individual cases or from further legislative refinement of the statute.

171. *Id.* § 25-34.1-10-12(a)(3)(E).

172. *See id.* § 25-34.1-10-15.

173. *Id.*

174. *See id.*

175. *See Tri-Professional Realty, Inc. v. Hillenberg*, 669 N.E.2d 1064 (Ind. Ct. App. 1996).

176. IND. CODE §§ 25-34.1-10-10(a)(3)(G), -10-11(a)(3)(F).

III. ENVIRONMENTAL LAW INTERSECTS WITH PROPERTY LAW:
THE *SHELL OIL CO. v. MEYER* DECISION AND SUBSEQUENT
LEGISLATIVE RESPONSE

Environmental laws have an undeniable impact on real estate. Laws that impose financial responsibility for hazardous waste clean-up costs on a joint, several and strict liability basis, for example, can render a parcel of property undesirable for a buyer, unsellable for a seller, and worthless as collateral for a lender. Finding an appropriate balance of the interest of protecting the environment and the health of individuals with the interest of promoting the productive use of land and the economy has been an on-going task for legislatures and courts over the past several decades.¹⁷⁷ The Indiana Supreme Court spoke on the relationship of environmental law to property law in the context of Indiana's Underground Storage Tank Act¹⁷⁸ in the case of *Shell Oil Co. v. Meyer*.¹⁷⁹

The supreme court described the *Meyer* case as dealing with "the liability of refiners under Indiana's Underground Storage Tank Act . . . for costs of corrective actions for leaks in tanks at retail gasoline stations owned by independent retailers."¹⁸⁰ The court further identified the "principal issue" as being "under what circumstances [is] a major oil company . . . an 'operator' of underground storage tanks located at an independent station that bears its brand."¹⁸¹ The case received notoriety as briefs were filed by at least twenty four amicus curiae, including the Attorney General of Indiana, attorneys general from twelve other states, the Acting Attorney General of Guam, the Indiana Department of Environmental Management, the City of Indianapolis, the Indiana Association of Cities and Towns, and several public interest groups and trade associations.¹⁸² When issued, the supreme court's opinion made the Indiana Supreme Court the highest state court in the nation to speak on the issue.

A. Facts of the Case

Plaintiffs in the case were six families who owned or lived in houses in West Point, Indiana. The town of West Point does not have a municipal water system, and each of the families relied on groundwater from wells for their drinking

177. Indiana's "brownfields" statute can be seen as one example of the balancing of these sometimes apparently competing policy interests. See *id.* § 6-1.1-42-1 to -42-3 (1998 & Supp. 1999). "Brownfield" is defined as an industrial or a commercial parcel of real estate that is abandoned or may not be operated at its appropriate use on which redevelopment is prohibitive because of hazardous substances contaminating the land. See IND. CODE § 13-11-2-19.3 (1998).

178. *Id.* §§ 13-23-1 to 13-23-15 (1998 & Supp. 1999).

179. 705 N.E.2d 962 (Ind. 1998).

180. *Id.* at 965-66.

181. *Id.* at 966.

182. The full list of amicus curiae can be found at *Meyer*, 705 N.E.2d at 965. Some of these same parties participated as amicus curiae in the companion case of *Shell Oil Co. v. Lovold Co.*, 705 N.E.2d 981 (Ind. 1998).

water supply.¹⁸³ In early 1989, plaintiff Kimberly Meyer noticed that her tap water had a petroleum smell. She notified the Tippecanoe County Health Department, which in turn contacted the Indiana Department of Environmental Management.¹⁸⁴ In June 1989, laboratory tests of the Meyers' water detected the presence of several contaminants, including benzene, which is a component of gasoline and a known carcinogen. It was later determined that the source of the groundwater contamination was a nearby retail gasoline station.¹⁸⁵ The history of the operation of that station proved critical to the supreme court's decision.

The record reveals that Fred Smith purchased the station in 1946, at which time he changed it from a Standard branded station to a Shell branded station. At the time of the purchase, Smith's principal occupation was as a "commissioned driver" for Shell, which meant that he delivered gasoline from Shell's bulk plant in Lafayette to farmers in the area and to his station in West Point.¹⁸⁶ Shell owned the gasoline that Smith delivered and retained title until paid by the purchaser.

In 1963, Murphy Enterprises ("Murphy") purchased the bulk plant from Shell and became a Shell "jobber."¹⁸⁷ At that time, Smith became a commissioned driver for Murphy. Murphy purchased gasoline from Shell, stored it at Murphy's bulk plant, and from there Smith delivered the gasoline to purchasers. The effect of Murphy's purchase and operation of the bulk plant was to insert an independent distributor into the chain of distribution of gasoline from the refiner to the retail outlet.¹⁸⁸ In 1971, Murphy changed its gasoline supplier from Shell to Unocal, a relationship that lasted until 1980 when Murphy sold the bulk plant.

Although Smith owned the station at West Point, he never managed it. Instead, he leased the station to a series of short-term lessees who operated gasoline stations and automotive service businesses.¹⁸⁹ Smith died in 1979, and his widow sold the station in 1981. The property was not used for gasoline sales after 1981, and the underground storage tanks were removed by the new owner in 1989.¹⁹⁰

B. Procedural History

The Meyers and the other neighbors (the "Landowners") filed a complaint against Shell Oil Co. ("Shell") and Unocal Oil Co. ("Unocal") in the Tippecanoe Superior Court on May 4, 1993.¹⁹¹ The Landowners asserted five common law

183. See *Meyer*, 705 N.E.2d at 966.

184. See *id.*

185. See *id.*

186. *Id.*

187. *Id.*

188. See *id.*

189. See *id.* at 966-67.

190. See *id.*

191. The Landowners also named Smith's widow and the purchaser of the station as defendants but dismissed them before trial. See *id.* at 967-68.

claims and a claim under the USTA for damages arising from groundwater contamination caused by the leaking underground storage tanks at the station. The common law claims were tried to a jury, but the remaining claim based on the USTA was reserved for a bench decision.¹⁹²

The jury returned a verdict in favor of Shell and Unocal on all of the common law claims, and judgment was entered on them in October 1994. The parties subsequently filed cross-motions for summary judgment on the USTA claim, both of which were denied. The parties then stipulated that they had no further evidence to present and submitted the claim for a decision on the record that had been developed in the jury trial.¹⁹³ The trial judge issued a Memorandum Opinion and Order on May 16, 1995, finding Shell and Unocal to be "operators" under the USTA and therefore liable for the costs associated with correcting the groundwater contamination and for the Landowners' other damages.¹⁹⁴ Following a bench trial to determine the cost of correcting the contamination, the trial court issued a Judgment on September 9, 1995, awarding the Landowners \$2,743,660.21 for corrective costs, \$1,459,721.25 for attorney fees and \$179,350.70 for litigation expenses.¹⁹⁵

Shell and Unocal appealed. The court of appeals affirmed the trial court's finding of liability under the USTA and the award of costs for the corrective action, with the exception of medical monitoring costs.¹⁹⁶ The appellate court also reversed and remanded with instructions to allocate attorney's fees and costs between the unsuccessful common law claims and the successful USTA claim and with instructions for computing interest of those fees.¹⁹⁷ Shell and Unocal then sought transfer to the Indiana Supreme Court, and the Landowners filed a cross-appeal seeking a new trial on their common law claims on the basis of an erroneous jury instruction.

C. Issues Relating to the USTA

The supreme court identified seven issues for decision,¹⁹⁸ but the most important ones for property law purposes relate to the standing of the Landowners to file suit against Shell and Unocal under the USTA, the definition of "operator" under the USTA adopted by the court, and the nature of damages that may be awarded to a person who successfully asserts a claim under the USTA. The court's decision on each of these issues gives dimension to the balance between environmental protection and property use.

1. *Standing*.—The USTA "generally provides for the regulation of underground storage tanks ('UST's') and the prevention and remediation of

192. *See id.* at 968.

193. *See id.*

194. *See id.*

195. *See id.*

196. *See id.*

197. *See id.*

198. *See id.*

pollution from tanks. It contains specific provisions designed to correct contamination from leaking underground storage tanks (LUST's)."¹⁹⁹ Section 8(b) of the USTA provides that "[a] person who . . . (2) undertakes corrective action resulting from a release from an underground storage tank . . . is entitled to receive a contribution from a person who owned or operated the underground storage tank at the time the release occurred. . . ." ²⁰⁰ Shell and Unocal argued that a "contribution" could only appropriately be sought from one having legal liability, and because the Landowners had no such liability they had no standing to bring suit under the USTA.²⁰¹

The court rejected that argument by pointing to the plain language of the USTA, which authorizes private actions by "persons."²⁰² The court concluded that a 1991 amendment to the USTA that repealed the requirement of state-initiated actions "significantly expanded the group of individuals who are entitled to invoke a right to 'a contribution' under the [USTA]."²⁰³ The court also supported its conclusion by comparing the USTA with language used in previously existing state environmental laws and the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA").²⁰⁴ Under CERCLA, only "responsible parties" can recover contributions in corrective action suits,²⁰⁵ and Indiana's environmental laws also contain definitions for "responsible parties"²⁰⁶ that the legislature could have used if had intended to limit the scope of parties who could recover under the USTA in a manner similar to the limitation in CERCLA.²⁰⁷ Use of the term "persons" instead of "responsible parties" indicated to the court that the legislature intended the USTA to confer standing on persons such as the Landowners.²⁰⁸ Provided that the other requirements of the USTA can be met, the Indiana Supreme Court's decision recognizes the greatest possible degree of standing, and thereby greatest availability of private actions to promote environmental interests.

2. *Identity of "Operators" Under the USTA.*—An issue not so easily resolved is the identity of "operators" under the USTA. Section 8(b) of the USTA imposes liability for corrective action resulting from a release from an underground storage tank on a person who "owned or operated" the UST at the time of the leak.²⁰⁹ There was no evidence in the record that either Shell or Unocal ever owned the West Point station, so they would only be liable to the

199. *Id.* at 967.

200. IND. CODE § 13-23-13-8(b) (1998).

201. *See Meyer*, 705 N.E.2d at 970.

202. *Id.* v

203. *Id.*

204. *Id.* at 971 (citing CERCLA, 42 U.S.C. §§ 9601-9675 (1994 & Supp. III 1997)).

205. 42 U.S.C. § 9613(f)(1) (1994).

206. *Meyer*, 705 N.E.2d at 971.

207. *See id.*

208. *See id.*

209. IND. CODE § 13-23-13-8 (1998).

plaintiffs, if at all, if they were operators of that station.²¹⁰

The term "operator" has a two-pronged definition as "[o]perator for purposes of IC 13-23 . . . means a person: (1) in control; or (2) having responsibility for; the daily operation of an underground storage tank."²¹¹ The trial court and the court of appeals based Shell's and Unocal's liability on the "responsibility for" prong, and the trial court concluded that "[t]he phrase 'having responsibility for' means those parties that retained *authority* to control the UST's and that *should* be responsible as a matter of public policy."²¹² The court stated that it granted transfer to determine the scope of the definition of "operator" under the USTA.²¹³

The Landowners argued that Shell and Unocal had "responsibility for the daily control" of the USTs at the West Point station because they retained the ability to control the station through jobber contracts with the bulk plant owner and through threats of debranding.²¹⁴ The Landowners further argued that Shell and Unocal should be held to be operators because they designed and profited from a distribution system with locally placed USTs and because they were in the best position to clean up contamination by virtue of their "greater access to technology and vastly greater financial resources."²¹⁵ Shell and Unocal countered by arguing that "control" should mean actual control, not practical leverage over the station owner or manager or the ability "to cajole, influence or demand results from station's managers."²¹⁶

To resolve these competing views, the court began by looking for "clues" in the language of the USTA.²¹⁷ It found two. First, it noted that the term "operator" included the phrase "daily operation of the underground storage tank."²¹⁸ To the court, "'daily' implied at least some continuous level of activity as opposed to installation, repair or removal of a storage tank or performance of some other irregular or infrequent action with respect to it."²¹⁹ Given the technology of the time, the only qualifying "daily" activities were filling the UST, dispensing gasoline from it and measuring its contents.²²⁰ The second "clue" deduced by the court was that the "control" or "responsibility" must relate "to the 'operation' of the underground storage tank itself and not to other aspects of the station's operation or management."²²¹

210. See *Meyer*, 705 N.E.2d at 971.

211. IND. CODE § 13-11-2-148(d) (Supp. 1999).

212. *Meyer*, 705 N.E.2d at 971 (citation omitted).

213. See *id.* at 972. The court also said that transfer enabled it to resolve a conflict in the court of appeals between this case and *Shell Oil Co. v. Lovold Co.*, 687 N.E.2d 383 (Ind. Ct. App. 1997), *rev'd*, 705 N.E.2d 981 (1998).

214. See *Meyer*, 705 N.E.2d at 971.

215. *Id.*

216. *Id.* at 973.

217. *Id.* at 972.

218. *Id.*

219. *Id.*

220. *Id.* at 972-73.

221. *Id.* at 973.

To determine whether actual control is necessary to satisfy the “in control of” prong of the USTA definition of “operator” or whether ability to control is sufficient, the court analyzed: 1) the federal legislative history of CERCLA and the Resource Recovery and Conservation Act (RCRA)²²² and administrative definitions under those acts; 2) the lender liability provisions under federal²²³ and state²²⁴ statutes; 3) the federal leaded fuel ban statute;²²⁵ 4) IDEM’s interpretation of the USTA as evidenced by prior enforcement actions;²²⁶ and 5) public policy.²²⁷ Although some of these factors proved inconclusive, the court found it significant that the “operator” definition in the USTA is identical to the definition in RCRA, which unlike CERCLA does not impose liability on parties who supply the contaminant.²²⁸ Shell and Unocal thus cannot be liable under the USTA merely because they supplied the gasoline from their refinery.²²⁹ The court also found it significant that the legislature had statutory models available to it where liability was imposed on refiners for the actions of their branded stations even if those stations were independent.²³⁰ The legislature’s failure to provide for refiner liability under the USTA despite the existence of these models led the court to conclude that actual control is required.²³¹ Specifically, the court said:

[A]s we read the current Indiana UST Act, the legislature has not seen fit to constitute every refiner with a brand an operator of the independent station flying its flag. Neither the language of the statute nor its limited legislative history suggests that the Oil Companies who supplied the gasoline to the distribution system, without more, are operators under the Act. And practical leverage over the station owner does not suffice whether through threat by a refiner of debranding, a threat by a bank to call a loan, or any other action by a person that may be able to influence or even dictate how the station’s operations are conducted, but has no actual or contractual relationship to the daily operation of the tank.²³²

Having decided that actual control over the daily operations of a UST is necessary for a party to be an “operator,” under the USTA, the court proceeded to determine if Shell or Unocal exercised such control over the West Point station.²³³ The court reasoned that the identity of persons who had

222. 42 U.S.C. §§ 6901 to 6992k (1994 & Supp. III 1997).

223. *See id.* § 6991b(h)(9) (Supp. III 1997).

224. *See* IND. CODE § 13-11-2-148(c) (Supp. 1999).

225. *See* 42 U.S.C. § 7545(n) (1994).

226. *See Meyer*, 705 N.E.2d at 976-77.

227. *Id.* at 977.

228. *See id.* at 974-75.

229. *See id.* at 974.

230. *See id.* at 976.

231. *See id.* at 977.

232. *Id.*

233. *See id.*

"responsibility for the daily operation" of the tanks, and therefore had liability as an "operator," turned on: "(1) what constituted the daily operation of the tanks, (2) who did these things, (3) in what capacity that person was acting and (4) who is responsible for that person's actions in that capacity."²³⁴

As previously noted, the "daily operations" of a UST at the time of the leak at the West Point station consisted of filling the tank, measuring the level of gasoline in it, and dispensing gasoline from it. The person who performed daily operations at the West Point station was Smith.²³⁵ Smith conducted these activities as an independent contractor and not an employee of Shell or Unocal. If liability were to be found for Shell or Unocal, it would depend on the court's resolution of the fourth question.

Answering that question required the court to review established principles of derivative or vicarious liability.²³⁶ Although noting that "[a]s a general matter, under the common law a principal is not liable for damages resulting from an independent contractor's wrongful acts or omissions,"²³⁷ the court added that "[u]nder accepted tort doctrines, however, an independent contractor may create liability for a principal under some circumstances."²³⁸ The court held that these common law rules are applicable in the context of operating a UST "to the same extent that common law liability exists for the contractor's actions."²³⁹ Included among those circumstances recognized by Indiana law is one in which a contract requires the performance of intrinsically dangerous work or constitutes a nuisance.²⁴⁰

The court found that "[f]illing a tank that is known to have the potential to leak and, if it does, to contaminate others' water supplies has elements that are strongly reminiscent of" the doctrines imposing liability on a principal for intrinsically dangerous work required by his contract with the independent contractor.²⁴¹ Accordingly, the court determined that Shell had the "requisite contact with the 'daily operations of the underground storage tank' at West Point to support liability under the [USTA]."²⁴²

Shell's liability, however, was not unlimited. The USTA imposes liability on persons who are owners and operators "at the time the release occurred."²⁴³ This limitation meant that Shell was derivatively liable for Smith's "responsibility for the daily operation" of the UST at West Point only for the period from 1946 to 1963 when Smith worked as an independent contractor for

234. *Id.*

235. *Id.* at 967.

236. *See id.* at 977-78.

237. *Id.* at 978.

238. *Id.*

239. *Id.*

240. *See id.*

241. *Id.*

242. *Id.* at 979.

243. IND. CODE § 13-23-13-8(b) (1998).

Shell.²⁴⁴ After 1963, Smith worked for Murphy, so Smith's actions could no longer bind Shell after that year. Because Smith never worked as a commissioned driver for Unocal, there was no time period that he could bind that company.²⁴⁵

Accordingly, the supreme court reversed that part of the trial court's decision that imposed any liability on Unocal and that imposed liability on Shell for the period 1963 to 1971.²⁴⁶ The court also "summarily affirm[ed] the decision of the court of appeals with respect to the following issues: future corrective action costs, medical monitoring costs, attorney fees, and the trademark jury instruction."²⁴⁷

D. The Legislature's Response

The supreme court's decision in *Meyer* was not welcome news in the petroleum industry, and work on a legislative response began swiftly. That response was House Enrolled Act 1578, which became effective on July 1, 1999, barely six months after the *Meyer* decision. The Act amended the USTA definition of "operator" by excluding a person who is not an owner or lessee of a facility where a UST is located, who does not participate in the management of the facility and "is engaged only in: (i) filling; (ii) gauging; or (iii) filling and gauging; the product level in the course of delivering fuel to an underground storage tank."²⁴⁸

By this amendment, the legislature struck out two of the three activities identified by the supreme court as supporting the "daily operation" of a UST. Only the act of dispensing gasoline, which would be done only by an owner or lessee of a gasoline station and not by a refiner or a jobber distributing that gasoline to an independently owned station, remains unexcepted. As a result, the immunity from private actions under the USTA recognized in the *Shell Oil Co.* case for refiners dealing with independent stations now extends to jobbers in the next level of distribution.

E. Continued Viability of the Shell Oil Co. v. Meyer Decision

Does the supreme court's decision have any continuing value after the 1999 legislative amendments to the USTA? Even though the court's holding on the "principal issue" it identified in the case has been superceded by legislative action, the opinion remains an important statement of several principles that were included in the court's opinion and were not affected by the legislatures response.

First, the USTA recognizes a private right of action of individuals to seek contributions toward the costs of remediating contamination and to seek related damages. Second, the Act contemplates payment of costs by owners and

244. *Meyer*, 705 N.E.2d at 980-81.

245. *See id.* at 979-80.

246. *See id.* 705 N.E.2d at 981.

247. *Id.*

248. IND. CODE § 13-11-2-148(e)(2)(C) (Supp. 1999).

operators before or after cleanup. Third, more than one person can be an operator of the same UST for liability purposes, so absence of actual ability to control the daily operation of a UST does not exclude the presence of having responsibility for such operation. Fourth, it is not necessary that a person perform every act constituting daily operation to be liable; performance of one included act can be sufficient. Fifth, liability under the USTA is strict and is retroactive to the time the release occurred.

In addition to the substantive rules announced in the *Meyer* decision, the court's approach to the issues presented by the case is also instructive. At least twice in the opinion, the court displays sympathy toward arguments made by the Landowners that would expand liability of oil refiners. In its discussion of IDEM's stated administrative policy of enforcing the USTA against refiners, the court states that "[m]uch as we might agree with the policy considerations underlying IDEM's current position"²⁴⁹ it had to reject the agency's argument as contrary to its actions in practice. Also, the court noted that "[t]he Landowners and amici offer compelling public policy arguments in favor of imposing liability on those who both profited from the sale of the contaminant and were in the best practical position to assure its containment."²⁵⁰

At the same time, the court displays an appropriate respect for the separation of powers of the legislative and judicial branches. The court interpreted the USTA to discover the legislature's intent and resisted any attempts made to persuade it to make policy not supported by that intent. In the words of the court, "[W]e are not free to adopt on our own a policy the legislature has rejected."²⁵¹

Although the liability of jobbers in distributing petroleum to independent retail stations is settled by the 1999 amendments to the USTA, the substantive principles applicable to persons who qualify as an operator and the judicial approach identified above will likely find a place in the analysis of other issues that will arise in the future under the USTA and other environmental laws.

IV. LANDLORD-TENANT RELATIONS: IDENTIFYING THE ROLES OF TORT LAW AND CONTRACT LAW

The fourth area of property law that received notable attention in 1999 is landlord-tenant relations in the context of residential leases. Cases in this area often involve claims by tenants against landlords for damages resulting from personal injuries incurred at the leased premises. Tenants and their advocates urge the expansion of common law causes of action to broaden the scope of landlords' liability, and landlords and their advocates argue for holding fast to established common law principles to restrict the scope of their liability. One of the ways that tenants have sought to expand landlord liability is to seek recognition of implied warranty claims in addition to established tort claims. Three appellate court opinions that were issued during the survey period,

249. *Meyer*, 705 N.E.2d at 976-77.

250. *Id.* at 977.

251. *Id.*

including a supreme court opinion authored by Chief Justice Shepard, make significant contributions toward clarifying the roles of tort principles and contract principles in defining the rights and duties of tenants and landlords in Indiana. These cases are: *Vertucci v. HNP Management Co.*,²⁵² *Lake County Trust Co. v. Wine*,²⁵³ both from the court of appeals, and *Johnson v. Scandia Associates, Inc.*²⁵⁴ issued by a divided supreme court.

*A. Contractual Limitation of Landlord Liability for
Personal Injury Claims by Tenants*

Vertucci involved a tort claim asserted by a tenant against her landlord for injuries she sustained when she was sexually assaulted by a non-resident at the swimming pool of the apartment complex where she resided.²⁵⁵ The evidence revealed that, prior to commencing occupancy, the plaintiff's father inquired about security at the apartments because his minor children, including the plaintiff, would be left alone during the day while he and his wife worked. An employee of the landlord told the father that identification cards were issued to tenants and that tenants were to carry the cards, especially when using common areas, because the cards would be checked to determine that users of common areas were tenants of the apartments. According to the father, no one ever checked the identification cards.²⁵⁶

The landlord filed a motion for summary judgment on the tenant's complaint. The landlord argued that it had no duty under the common law to protect tenants from an unforeseeable criminal attack by a third party, that it never assumed such a duty, and that the lease contract contained a disclaimer of liability for the tenant's injuries. The tenant contended that the landlord had assumed a duty to protect its tenants by issuing the identification cards and that the disclaimer language in the lease did not apply to the sexual assault of the plaintiff. The trial court agreed with the landlord and granted its motion for summary judgment.²⁵⁷

The court of appeals reversed and remanded.²⁵⁸ The court began its analysis by determining the effect of the exculpatory clause in the *Vertucci*'s lease. That clause provided:

Tenant agrees that Landlord . . . shall not be liable for any damage or injury to Tenant . . . for injury to person or property arising from theft, vandalism, fire, or casualty occurring in the premises or building. LANDLORD IS NOT RESPONSIBLE FOR, AND DOES NOT GUARANTEE, THE SAFETY OF TENANT, TENANT'S GUESTS, FAMILY, EMPLOYEES, AGENTS, OR INVITEES. TENANT

252. 701 N.E.2d 604 (Ind. Ct. App. 1998).

253. 704 N.E.2d 1035 (Ind. Ct. App. 1998).

254. 717 N.E.2d 24 (Ind. 1999).

255. See *Vertucci*, 701 N.E.2d at 605.

256. See *id.*

257. See *id.* at 606.

258. See *id.* at 608.

AGREES TO LOOK SOLELY TO THE PUBLIC POLICE AUTHORITIES FOR SECURITY AND PROTECTION. ANY SECURITY THAT MAY BE PROVIDED IS SOLELY FOR THE PROTECTION OF LANDLORD'S PROPERTY. . . .²⁵⁹

The court approached the lease like any other form of contract. Applying the contract interpretation principle that terms in a contract are to be strictly construed against the drafter of the document, the court concluded that a sexual assault did not fit within the definition of a "casualty" and, therefore, the exculpatory clause did not preclude the landlord from assuming a duty to protect the plaintiff.²⁶⁰

Finding no contractual bar to liability, the court then determined whether the landlord owed a duty to the plaintiff to protect her from sexual assault by a non-resident. The starting point for the court was the traditional common law rule that "a landlord does not have a duty to protect a tenant from loss or injury due to the criminal actions of a third party."²⁶¹ The court noted an exception to the general rule, however, by which a duty to protect tenants can be imposed on a landlord: "[A] duty may be imposed upon one, who, by affirmative conduct or agreement assumes to act, even gratuitously, for another."²⁶² As a result, "liability to protect a tenant from criminal activity may be imposed on a landlord who voluntarily undertakes to provide security measures, but does so negligently."²⁶³

To determine whether the issuance of identification cards constituted a voluntary undertaking to provide security measures, the court focused on two previous cases, *Nalls v. Blank*,²⁶⁴ and *Bradtmiller v. Hughes Properties, Inc.*²⁶⁵ In *Nalls*, a tenant claimed that her landlord was liable for injuries resulting from an assault by a third party who had gained access to the floor of the building where the plaintiff's apartment was located. The appellate court reversed the trial court's grant of summary judgment in favor of the landlord. The court concluded that by providing self-closing and self-locking doors both at the point of entry into plaintiff's building and at the point of entry onto her particular floor "the trier of fact could reasonably infer that [the landlord] had undertaken to provide security to [the tenant] against criminal attack by a third party."²⁶⁶

In *Bradtmiller*, the landlord was found not liable for injuries sustained by a tenant when he was assaulted by a third party as part of an altercation relating to the tenant's reserved parking space.²⁶⁷ The tenant had reported the unauthorized

259. *Id.* at 606 (citation omitted).

260. *Id.* (citing *Center Management Corp. v. Bowman*, 526 N.E.2d 228, 236 (Ind. Ct. App. 1988)).

261. *Id.* at 607.

262. *Id.* (citation omitted).

263. *Id.* (citation omitted).

264. 571 N.E.2d 1321 (Ind. Ct. App. 1991).

265. 693 N.E.2d 85 (Ind. Ct. App. 1998).

266. *Vertucci*, 717 N.E.2d at 607 (quoting *Nalls*, 571 N.E.2d at 1323).

267. *Bradtmiller*, 693 N.E.2d at 87.

use of his space to the landlord on several occasions, and one of the landlord's employees said she would "see what she could do." The appellate court affirmed the trial court's entry of summary judgment in favor of the landlord, holding that "notwithstanding notice to the landlord of violations of the parking policy, criminal activity was not a reasonably foreseeable risk of failing to enforce the parking policy and therefore, there was no duty on the part of the landlord to protect the tenant from the injury he sustained."²⁶⁸

The court in *Vertucci* found that case to be more like *Nalls*, where the self-closing and self-locking doors were installed for a safety purpose, than *Bradtmiller*, where the assigned parking space policy was created for a convenience purpose.²⁶⁹ Accordingly, the court concluded that the trier of fact could infer from the issuance of identification cards that the landlord "had undertaken to provide security to the Vertuccis against criminal activity by non-residents by keeping non-residents from the premises."²⁷⁰

The *Vertucci* case contains two important principles for determining rights of tenants and responsibilities of landlords in tort claims for personal injuries caused by criminal acts of third parties. First, a safety versus convenience test is applied to determine whether a landlord has assumed a duty to protect its tenants. The precise nature and extent of acts that will support imposition on landlords of an assumed duty to protect tenants is left for future cases to decide.²⁷¹ When, for example, does an apartment feature cease to be an amenity and become a security item? Second, traditional contract interpretation principles, including construing ambiguities in a lease against the landlord-drafter, are applied to residential leases as in any other contract. As will be shown below, although application of traditional contract principles in the context of exculpatory clauses in tort cases may benefit tenants, an analytical approach that treats residential leases in the same manner as all other contracts largely benefits landlords.

B. Contract and Tort Analysis of Tenants' Challenges to Eviction Proceedings

In *Lake County Trust Co.*, a mobile home park landlord sued to evict tenants for failure to pay rent. Each of the tenants had executed written leases with the landlord, which contracts provided that all tenancies were month-to-month. When the landlord raised lot rents seven percent (\$15.00 per month) many of the tenants protested. After being served with notices to quit, some tenants were

268. *Id.*

269. *See Vertucci*, 717 N.E.2d at 608.

270. *Id.*

271. Even if a duty to protect is assumed by a landlord, the tenant must still prove breach of that duty, causation and damages. Also, the court does not discuss, except in footnote 1, whether a duty can be imposed on a landlord by way of the three-part analysis that includes foreseeability of harm arising from criminal actions as illustrated in *Webb v. Jarvis*, 575 N.E.2d 992, 995 (Ind. 1991).

permitted to cure their default by paying the increased rent plus late fees.²⁷² Other tenants refused to pay, and the landlord commenced eviction proceedings. The tenants filed counterclaims against the landlord alleging that the landlord's actions constituted: 1) a breach of a contractual duty of good faith and fair dealing; 2) an abuse of process; 3) a violation of civil rights under 42 U.S.C. § 1983; and 4) a breach of "equity." The trial court also certified the case as a class action. The landlord filed a motion for summary judgment on all of the tenants' counterclaims and a motion to decertify the class, both of which the trial court denied.²⁷³

The appellate court disposed of the tenants' abuse of process, civil rights and equity claims with little difficulty. The court held that the landlord was not liable for abuse of process because eviction for failure to pay rent "is a proper purpose contemplated by Ind. Code § 16-41-27-30,"²⁷⁴ and that "there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions."²⁷⁵ The court also held that the tenants failed to allege any "state action" as required by § 1983 and that "an ejectment in retaliation for the exercise of First Amendment rights is, without more, 'purely private' action."²⁷⁶ Finally, the court held that the tenants could not proceed on their "equity" claim because they had not specified any particular theory they wished to pursue, and the stated counterclaims were "without merit."²⁷⁷ The court also concluded that the tenants' "equity" claim was barred because the tenants themselves had unclean hands as they intentionally refused to comply with the terms of the lease.²⁷⁸

The substantive claim that generated the most discussion and that will be most influential in adjusting rights and obligations of tenants and landlords in the future is the contract analysis of the tenants' good faith and fair dealing claim. The tenants' argument was based on section thirteen of the lease, which stated that "the posted rules and regulations . . . attached to this lease are part of this lease at the time of execution."²⁷⁹ The preamble to the lease contained a policy statement that the mobile home park "is conceived as a community of neighbors living in harmony . . . not by rigid rules and regulations. . . . When these standards are fair, reasonable and logical . . . when they are applied with on an impartial basis . . . each resident can be assured a maximum of freedom, privacy, safety and comfort. . . ."²⁸⁰ The tenants contended that this preamble statement imposed on the landlord a duty of good faith and fair dealing which was

272. See *Lake County Trust Co. v. Wine*, 704 N.E.2d 1035, 1038 (Ind. Ct. App. 1998).

273. See *id.* at 1038.

274. *Id.* at 1040.

275. *Id.* at 1040-41 (quoting *Reichhart v. City of New Haven*, 674 N.E.2d 27, 30 (Ind. Ct. App. 1996)).

276. *Id.* at 1041.

277. *Id.* at 1042.

278. *Id.*

279. *Id.* at 1039 (citation omitted).

280. *Id.* (citations omitted).

expressly incorporated into the lease by section thirteen.

The appellate court disagreed and reversed the trial court's denial of the landlord's motion to dismiss the tenants' contract claim along with their other three claims.²⁸¹ The court's approach to the issue may be as significant to the ongoing battles between tenants and landlords as the decision itself. The court began its analysis with a statement that reverberates in the supreme court's opinion in *Johnson v. Scandia Associates, Inc.* and in cases beyond the survey period:²⁸² "Rules of construction for contracts apply to leases."²⁸³ While this statement might be considered a truism by landlords, it foreshadows the refusal of the supreme court to impose an implied warranty of habitability on landlords as part of every residential lease.

The court in its contract analysis noted that the duty of good faith and fair dealing "is applied in contract law only under limited circumstances such as those involving insurance contracts."²⁸⁴ The court acknowledged, however, that even outside insurance contracts a duty of good faith and fair dealing "may apply to a contract where the terms of the contract are ambiguous or where the terms

281. See *id.* at 1040.

282. See *Zawistoski v. Gene B. Glick Co., Inc.*, 727 N.E.2d 790 (Ind. Ct. App. 2000). In *Zawistoski*, a tenant sued her landlord for personal injuries she received when she tripped on a raised portion of a sidewalk at the apartment complex. The landlord had advertised the apartment complex as designed for individuals over age 62 and accessible for individuals with limited mobility. The tenant asserted claims sounding in negligence, breach of contract and breach of express warranty. The landlord moved for summary judgment on the breach of contract and breach of warranty claims, which motion was granted. See *id.* at 792. On appeal the tenant asserted that a warranty was created by paragraph 10(a)(2) of the lease contract, which contained the landlord's agreement to "maintain the common areas and facilities in a safe condition." *Id.* The court rejected the tenant's arguments and held that: 1) the statements in paragraph 10(a)(2) were merely a restatement of the landlord's common law duty to its lessees; 2) a finding of a warranty as argued by the tenant would conflict with other language in the lease by which the landlord expressed its intent not to be an insurer of its lessees' safety; and 3) a finding of a warranty would render meaningless other provisions of the lease. See *id.* at 794. The court also rejected the tenant's argument that a "higher standard" of conduct should be imposed on the landlord because the lease was directed at "elderly renters" and her argument that the lease represented a "contract of adhesion" entered into by parties with "vastly different bargaining power." *Id.* "While it may be true that the parties were in somewhat unequal bargaining position, this is true in many contractual relationships. Further, in this case, Zawistoski certainly had the option of leasing an apartment elsewhere if she did not like the terms of the lease with Glick. Moreover, we reject Zawistoski's attempt to portray people over the age of sixty-two as feeble, infirm, and requiring assistance with entering into a basic contract." *Id.* Using as its guide the principles that "[a] lease is to be construed in the same manner as any other contract," *id.* at 792, and that "the intention of the parties to a contract is to be determined from the four corners of the document," *id.*, the court failed to find any express warranty by the landlord and refused "to read into the contract terms to which the parties did not agree." *Id.*

283. *Lake County Trust Co.*, 704 N.E.2d at 1039.

284. *Id.*

expressly apply such a duty”²⁸⁵ and that a contract may incorporate another unsigned writing, like the preamble, “when the contract expressly incorporates the terms of the writing.”²⁸⁶ The court concluded that although the language of the lease incorporated the terms of the rules and regulations, each document “retain[ed] [its] original meaning,” which means that the reference to “fairness” in the preamble was restricted to that document and did not become a term of the lease contract.²⁸⁷

As an alternative to the attempt to incorporate an express duty of good faith and fair dealing into the lease by way of the preamble, the tenants also urged the court to imply the existence of such a duty into leases “in general.” The court stated that “contract law does not require such an duty”²⁸⁸ and quoted a 1990 Indiana Supreme Court case for the proposition that

[i]t is not the province of courts to require a party acting pursuant to such a contract to be “reasonable,” “fair,” or show “good faith” cooperation. Such an assessment would go beyond the bounds of judicial duty and responsibility. It would be impossible for parties to rely on the written expression of their duties and responsibilities.²⁸⁹

The court also rejected any notion that tenants are entitled to special considerations outside of traditional contract law principles or that landlords have undue influence in the execution of leases because they are sophisticated while tenants are unsophisticated. The court wrote, “Under Indiana Law, a person is presumed to understand and assent to the terms of contracts they sign.”²⁹⁰ The court closed its analysis of the tenants’ disparate bargaining power argument by stating:

Aside from the fact that Williamsburg is a ‘corporate landlord,’ the [tenants] cannot point to any undue influence or unequal bargaining power exercised by Williamsburg in the execution of their respective leases; furthermore, as a matter of law, we are unwilling to extend a duty of good faith and fair dealing to corporate landlords. Like all tenants, the residents were free to execute a lease with a different landlord if the terms of the lease were unacceptable. By asking this court to apply a duty of good faith to an unambiguous lease, the [tenants are] effectively requesting this court to rewrite the terms of an agreement where the intent of the parties is clear. Such an exercise of our discretion is without the boundaries of our authority and in clear contravention of

285. *Id.*

286. *Id.*

287. *Id.* 1040.

288. *Id.*

289. *Id.* (quoting *First Federal Sav. Bank of Ind. v. Key Markets, Inc.*, 559 N.E.2d 600, 604 (Ind. 1990)).

290. *Id.*

contract law as outlined by our supreme court.²⁹¹

This contract law “as outlined by our supreme court” in the context of landlord-tenant disputes was largely reaffirmed approximately nine months later in the *Johnson* case.

C. The Circumscribed Role of Contract Law in Claims for Breach of Warranties of Habitability in Residential Leases

*Johnson v. Scandia Associates, Inc.*²⁹² involves a tenant’s attempt to recover damages from her landlord for personal injuries she received from an electrical shock that occurred as she simultaneously touched two appliances in the kitchen of her apartment. The tenant’s complaint asserted claims based on negligence and on an implied warranty of habitability that she contended was incorporated into the lease contract. The landlord filed motions to have both claims dismissed for failure to state a claim. The trial court dismissed the warranty claim but refused to dismiss the negligence claim.²⁹³ Following a defense verdict on the negligence claim, the tenant appealed the dismissal of her breach of warranty claim. The supreme court, in a split decision,²⁹⁴ affirmed the trial court’s ruling dismissing the tenant’s breach of warranty claim.²⁹⁵ The court recognized “for the first time that such a warranty may be implied in some leases”²⁹⁶ but concluded that Johnson had not alleged facts to support the imposition of an implied warranty of habitability into her particular lease.²⁹⁷

The supreme court’s analysis consists of two parts: determining the conditions under which a warranty of habitability will be implied in a residential lease, and the nature of the damages that can be awarded to a tenant who proves a breach of such a warranty. Johnson did not allege that the landlord had made any express warranties about the apartment; instead, she based her complaint on a warranty of habitability that she contended was implied into her written lease.²⁹⁸ The tenant further acknowledged that Indiana law does not recognize warranty claims as a basis for a personal injury action, but she argued that

291. *Id.*

292. 717 N.E.2d 24 (Ind. 1999).

293. *See id.* at 26.

294. Chief Justice Shepard wrote the opinion of the court and was joined by Justices Sullivan and Selby. Justice Boehm concurred in the result but issued an opinion agreeing with dissenting Justice Dickson that the law “implies a warranty of habitability.” *Id.* at 32 (Boehm, J., concurring in part and dissenting in part). Justice Dickson filed a dissenting opinion. *Id.* (Dickson, J., dissenting).

295. *See id.*

296. *Id.* at 26.

297. *See id.* at 32. The court of appeals had affirmed the trial court’s decision in part and reversed in part. Its decision, now vacated, is reported at 641 N.E.2d 51. The supreme court’s summary of the court of appeal’s decision is found at footnote 1. *See Johnson*, 717 N.E.2d at 26 n.1.

298. *See id.* at 26.

recovery for such injuries was proper as "a logical extension of the law."²⁹⁹

To discern the proper analytical approach to be applied to the tenant's claim, the supreme court reviewed the historical development of the warranty of habitability in Indiana common law, a development that the court described as part of a general expansion of "residential tenants' bundle of rights."³⁰⁰ In the context of the warranty of habitability in the sale of residential housing, the court noted that implicit in its prior holdings was "the notion that the warranty was implied-in-fact in the original parties' sales contract."³⁰¹ Those prior holdings included *Theis v. Heuer*³⁰² and *Barnes v. Mac Brown & Co., Inc.*,³⁰³ in which the warranty of habitability was first recognized in the sale of a newly constructed house to the original purchaser and was then extended to benefit subsequent purchasers, at least with regard to latent defects.

The supreme court then reviewed a 1980 case, *Great Atlantic & Pacific Tea Co. v. Wilson*,³⁰⁴ which held that the implied warranty of habitability does not attach merely on transfer of possession. In that case, a tenant was held not liable to her landlord for injuries caused by a dangerous condition that existed in the premises when the tenant tendered possession back to the landlord.³⁰⁵ The supreme court identified a unifying principle in these three cases by stating, "In the very least, [these cases] implied that law of contract was the source of the warranty of habitability."³⁰⁶

A fourth relevant precedent was the court of appeals' decision in *Breezewood Management Co. v. Maltbie*,³⁰⁷ where, based on the facts of that case, an implied warranty of habitability was found to exist, and to have been breached, in the context of a residential lease.³⁰⁸ The supreme court found it significant that the damages awarded to the tenant in *Breezewood* for breach of the implied warranty were "damages based on the law of contract" and did not include any personal injury damages.³⁰⁹ *Breezewood* was further evidence for the supreme court that "[p]lainly, a warranty of habitability, whether in the sale or lease of residential dwellings, has developed in the common law of Indiana, and its roots are in the law of contract."³¹⁰

Having deduced the roots of the warranty, the court then defined its substance, the manner by which it becomes implied into a lease, and the remedies available if a breach is established. The court identified the substance of the

299. *Id.*

300. *Id.* at 27.

301. *Id.*

302. 280 N.E.2d 300 (Ind. 1972).

303. 342 N.E.2d 619 (Ind. 1976).

304. 408 N.E.2d 144 (Ind. Ct. App. 1980).

305. *See Johnson*, 717 N.E.2d at 28 (citing *Great Atl. & Pac. Tea Co.*, 408 N.E.2d at 144).

306. *Id.* (citations omitted).

307. 411 N.E.2d 670 (Ind. Ct. App. 1980).

308. *See id.* at 671, 675.

309. *Johnson*, 717 N.E.2d at 28.

310. *Id.*

warranty as a landlord's "affirmative declaration of the apartment's fitness for habitation, that is, as a dwelling place."³¹¹ The court expanded on this statement by adding, "Habitability is not the same as no risk of harm. . . . An apartment can thus provide adequate shelter and amenities, as promised, and still be a place which presents some risk."³¹²

The distribution of these risks between tenant and landlord influenced the court's decision concerning the availability of a breach of warranty claim for a tenant. Under tort principles, risks are distributed on the basis of socially dictated duties not to expose others to unreasonable risk of harm. Tort "liability is involuntary, and it is balanced between the parties according to each's comparative fault."³¹³ By contrast, risks are distributed under contract law on the basis of agreement and consent. Liability under contract principles is strict; parties promise either to perform their obligations under the contract or to compensate the other party for damages resulting from the breach.³¹⁴ As a result, "[c]ontracts are private, voluntary allocations by which two or more parties distribute specific entitlements and obligations."³¹⁵ According to the supreme court, a warranty of habitability, therefore, requires a voluntary and affirmative promise by the landlord in exchange for some return promise from the tenant. The scope of the promises determines the scope of the warranty. A different approach would require, according to the court, a promise that a tenant would be free from injury and would result in strict liability for landlords.

Freely bargained-for express warranties of habitability voluntarily assumed by a landlord are likely to be rare, so the more common situation addressed by the court in *Johnson* is under what conditions will an implied warranty be imposed upon a landlord. Because the court characterized the "[i]mposition of an unbargained-for obligation on a contract . . . [as] derogat[ing] the common law,"³¹⁶ it concluded that "the law must state with fair specificity the warranty being imposed and the class of transactions covered by it."³¹⁷

One possible source of the terms of such an imposed warranty is building or housing code provisions, which can contain prescribed standards for housing conditions. The court refused to impose such codes automatically into all residential leases absent "explicit statutory or regulatory language imposing on landlords the obligation to warrant a codified standard or habitability in property rented as a residence."³¹⁸

Absence of a warranty automatically imposed by law into all leases does not, however, exclude the possibility that a warranty of habitability can be implied in-fact into individual leases. Such warranty implied in-fact can arise "from the

311. *Id.*

312. *Id.* at 29.

313. *Id.*

314. *See id.* at 29 & n.7.

315. *See id.* at 29.

316. *Id.* at 30.

317. *Id.*

318. *Id.*

course of dealing between the parties and may be evidenced by the acts done in the course of performance or by ordinary practices in the trade.”³¹⁹ The court identified course of dealing as the “best way of viewing *Breezewood*.”³²⁰ The court in *Breezewood* had held that “a landlord could be held liable to his tenant on a breach of implied warranty, at least where there was a housing code and city inspectors had cited the landlord with multiple violations.”³²¹ For the supreme court the source of the implied in-fact warranty in *Breezewood* was the landlord’s actions and not the existence of the building code itself. Speaking of the tenant in *Breezewood*, the supreme court stated that, “[a]t most, the tenant’s expectation that conditions [in her apartment] would be made to comply with the housing code arose from the landlord’s post-inspection promise to repair.”³²² Because the tenant in *Johnson* did not identify any local law as the warranty she sought to have implied into her contract and did not identify any facts to support implication of the warranty into the lease as a result of the landlord’s conduct, the supreme court affirmed dismissal of her breach of warranty claim.³²³

The supreme court found the roots of a warranty of habitability claim in contract law, and so it also found there limitations on the remedies available for breach of that warranty. The court stated, “Consequential damages may be awarded on a breach of contract claim when the non-breaching party’s loss flows naturally and probably from the breach and was contemplated by the parties when the contract was made.”³²⁴ This rule “generally limits consequential damages to reasonably foreseeable economic losses.”³²⁵ Accordingly, a plaintiff can recover for personal injuries on a contract claim “only when the particular injury was within the parties’ contemplation during contract formation.”³²⁶ Such a showing may be made by reference to an express contract term in the lease or by reference to evidence permitting it to be implied into the lease.³²⁷ In either event, the warranty must be “derive[d] from the agreement between the tenant and the landlord.”³²⁸ *Johnson* could not meet this requirement, so the supreme court concluded that her claim was also subject to dismissal on that basis.³²⁹

319. *Id.* at 30-31.

320. *Id.* at 31.

321. *Id.* at 28 (citation omitted).

322. *Id.* at 31.

323. *See id.* at 32.

324. *Id.* at 31.

325. *Id.* (citing *Strong v. Commercial Carpet Co.*, 322 N.E.2d 387, 391-92 (Ind. Ct. App. 1975)).

326. *Id.* (citing *Strong*, 322 N.E.2d at 391-92).

327. *See id.*

328. *Id.* at 32.

329. *See id.*

*D. The Status of Breach of Warranty Claims After
Johnson v. Scandia Associates, Inc.*

The *Johnson* decision was welcome news for landlords and a disappointment for tenants. The supreme court adhered to traditional common law contract principles and treated residential leases in the same manner as any other type of contract. The court also viewed residential leases against a "freedom of contract" model in which landlord and tenant have equal bargaining power and a ready supply of alternative housing sources for tenants if mutually acceptable lease terms cannot be achieved. Finally, the court views such leases against an economic model in which a residential lease represents a negotiated package of benefits and obligations resulting in a balance of the landlord's interests and the tenant's interests. Such models were also at work in *Lake County Trust Co. v. Wine*, and their validation by the supreme court will certainly result in their use in subsequent cases, as can be seen in *Zawistosky v. Gene B. Glick Co., Inc.*

With such models as the foundation for the supreme court's opinion, it is not surprising that the court refused to hold that an implied warranty of habitability is implied by law into every residential lease. One can certainly question the constraint the court felt to follow traditional common law principles and not to "impose" an unbargained-for warranty term into a residential lease. The court acknowledged its role in establishing a warranty of habitability in the sale of residences, both to original and to remote buyers.³³⁰ The court would also have been aware of existing law in which insurance contracts are subjected to a different type of analysis than other types of contracts³³¹ and of warranties implied by law into sales contracts under the Uniform Commercial Code.³³²

One can also question the validity of the analytical models chosen by the court to judge residential leases. Do the majority of tenants of residential apartments bargain for the inclusion or exclusion of terms, including habitability, in a lease? Do they have an equal understanding of lease terms and a supply of alternatives in the marketplace if lease negotiations break down?

The *Johnson* opinion is not totally one-sided, however, as the court does "recognize for the first time" that a warranty of habitability "can be implied" in residential leases.³³³ Even though express inclusion in a residential lease is not a likely occurrence, the court leaves open at least two ways in which a warranty of habitability can be implied. The first is actions taken by the lessor. Such actions can take a variety of forms, and landlords will continue to face claims by tenants asserting that some action by the landlord supports the existence of a warranty.

The second is housing or building codes. Even though the court refused to define a warranty of habitability by the building code applicable to *Johnson's*

330. See *Johnson*, 717 N.E.2d at 27-28.

331. See *Lake County Trust Co. v. Wine*, 704 N.E.2d 1035, 1039 (Ind. Ct. App. 1998).

332. See IND. CODE § 26-1-2-314, -315 (1998); *Zawistoski v. Gene B. Glick Co., Inc.*, 727 N.E.2d 790, 794 (Ind. Ct. App. 2000).

333. *Johnson*, 717 N.E.2d at 26.

apartment, the use of such codes for that purpose was not completely forestalled. The court wrote that habitability is "not necessarily" prescribed by a housing or building code, but it also wrote that "[h]abitability is an objective factual determination which may be codified."³³⁴ The court also stated that "*absent explicit statutory or regulatory language*" it could not "impos[e] on landlords the obligation to warrant a codified standard of habitability in property rented as a residence. . . ."³³⁵ The necessary corollary of this statement is that legislative and administrative bodies are free to create such explicit language that will impose an implied warranty of habitability into residential leases if that result is desired by the electorate. Such warranties are already statutorily imposed on a state-wide basis for the new construction³³⁶ and remodeling³³⁷ of single family residences.

The court appears to sanction local ordinances and regulations to define the standard for warranty of habitability for that locale as it speaks of "[a] community's adoption of a building or housing code."³³⁸ The court does not appear troubled by the prospect of a patchwork of local codes and resulting warranties as it acknowledges that such codes "vary enormously in their prescriptions."³³⁹ Thus, the next battleground concerning the warranty of habitability may well be in the city- and county council chambers around the state. If such explicit codes imposing a codified standard of habitability are enacted, the role of the courts will shift from common law contracts analysis to interpreting the codes to carry out the intent of the legislative body in mandating a standard of habitability in residential leases.

CONCLUSION

Property law has been described as an area that "usually develops in an evolutionary fashion" and where the rate of change is "measured in terms of decades and centuries rather than in months and years."³⁴⁰ That characterization is not appropriate for property law in Indiana in the past year. In this one single year, at least four major developments occurred: 1) the law of mechanic's liens was changed to abolish the relation back principle and no-lien contracts with regard to the improvement of commercial real estate; 2) the principle of subagency was abolished, and the duties real estate licensees owe to their clients is now based on working relationship; 3) the supreme court and the legislature

334. *Id.* at 30.

335. *Id.* (emphasis added).

336. *See* IND. CODE § 32-15-7 (1998).

337. *See id.* § 24-5-11.5.

338. *Id.*

339. *Id.*

340. GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE TRANSFER, FINANCE & DEVELOPMENT 455 (West Group 5th ed. 1998).

defined the term “operator” for purposes of the Underground Storage Tank statute; and 4) the court of appeals and the supreme court spoke on the roles of tort and contract principles in disputes between landlords and tenants. The law of the 2000 survey period and beyond will likely involve cases growing out of the altered legal landscape resulting from these developments.

DEVELOPMENTS IN INDIANA TAXATION

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INTRODUCTION

Both the 111th Indiana General Assembly and the Indiana Tax Court contributed changes and clarifications to the Indiana tax laws in 1999. This Article highlights the more interesting developments for the period of October 1, 1998 through September 30, 1999.

I. GENERAL ASSEMBLY LEGISLATION

There were numerous legislative changes in 1999 that impacted Indiana taxation. While many of the changes were made to fine-tune existing laws, significant policy changes occurred in the following major areas: sales and use taxes; state and local income taxes; state offices and administration; and property taxes.

A. Sales and Use Taxation

The 1999 general assembly passed three bills with provisions that impacted sales and use taxation both procedurally and substantively.¹ One bill established a requirement that the Indiana Department of State Revenue ("IDSR") must annually compile a county-by-county list of retail merchants that sell tobacco products.² The IDSR must provide the information to the division of mental health and the alcoholic beverage commission.³ The list must include the name and business address of each location where the retailer sells the products.⁴ The IDSR is also required to provide an updated list annually with additions and deletions since the previous report.⁵ The statute expressly requires the retail merchant to provide the information to the IDSR.⁶

In the second bill, the general assembly amended the statutory provision dealing with the tax on motor fuel sales.⁷ Prior to the amendment, Indiana was not collecting sales tax on kerosene.⁸ Under the amended statute, the tax on

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1. See IND. CODE §§ 6-2.5-6-14, 6-2.5-7-3, 6-2.5-10-1 (Supp. 1999).

2. See *id.* § 6-2.5-6-14(a).

3. See *id.* § 6-2.5-6-14(a)(3).

4. See *id.* § 6-2.5-6-14(a)(1).

5. See *id.* § 6-2.5-6-14(a)(2)-(3).

6. See *id.* § 6-2.5-6-14(b).

7. See *id.* § 6-2.5-7-3.

8. The amendment brings Indiana in line with the federal government which began

kerosene sales from a metered pump is calculated in the same manner as the tax on the sale of "special fuel."⁹ Specifically, a tax of 5% is imposed on the sale unless an exemption certificate is presented.¹⁰ A second provision stated that the 5% tax is to be imposed on the price per unit of kerosene *before* adding state and federal excise taxes.¹¹ The result is rounded to the nearest \$.001.¹² This amendment allows a retailer of kerosene to "back out" the state and federal excise taxes just as it would in calculating the tax on the sale of gasoline or special fuel.¹³

In addition to these changes to specific taxes, the general assembly modified the distribution percentages for all sales and use taxes collected by the IDSR.¹⁴ The amendment lowered the distribution of proceeds to the state general fund from 59.2% to 59.03%.¹⁵ The amendment also added a provision allocating 0.17% of proceeds to the commuter rail service fund.¹⁶

B. State and Local Income Tax

The general assembly made several changes affecting the computation of adjusted gross income ("AGI") used by individuals in calculating the adjusted gross income tax. One law created a deduction for the amount of any Holocaust victim's settlement payment included in that individual's Federal AGI.¹⁷ Separate provisions of the law define who is eligible for the deduction¹⁸ and what is to be included as a Holocaust victim's settlement payment.¹⁹ This deduction applies retroactively as of January 1, 1998.²⁰

A second law established an AGI tax deduction for premiums paid on any long-term care insurance policy approved by the Indiana Long Term Care Insurance Program.²¹ The deduction may be claimed if the premium payments are for the benefit of the taxpayer or the taxpayer's spouse, or both.²² A third provision established a deduction of \$500 for taxpayers and their spouses who

applying a federal excise tax to kerosene in January 1, 1998. *See* 26 U.S.C. § 4081 (Supp. IV 1999).

9. *See* IND. CODE § 6-6-2.5-22 for definition of "special fuel."

10. *See id.* § 6-2.5-7-3(b)(ii).

11. *Id.* § 6-2.5-7-3(b)(i).

12. *See id.* § 6-2.5-7-3(b).

13. *Id.* § 6-2.5-7-3(b)(i).

14. *See id.* § 6-2.5-10-1.

15. *See id.* § 6-2.5-10-1(b)(2).

16. *See id.* § 6-2.5-10-1(b)(5).

17. *See* Ind. Pub. L. No. 128-1999, § 27 (codified at scattered sections of IND. CODE § 6-3-1).

18. *See* IND. CODE § 6-3-1-29 (Supp. 1999)

19. *See id.* § 6-3-1-30.

20. *See id.*

21. *See id.* § 6-3-1-3.5.

22. *See id.* § 6-3-1-3.5(a)(16)

qualify for the federal deduction for the aged and have AGI under \$40,000.²³ This deduction is in addition to the previously existing \$1000 dollar personal exemption²⁴ and \$1000 additional exemption for taxpayers who are sixty-five years old and over and/or blind.²⁵ The additional \$500 deduction applies retroactively to tax years beginning after December 31, 1998.²⁶

The general assembly increased the deduction amount for dependents from \$500 to \$1500 per year.²⁷ The increase is retroactive to January 1, 1998.²⁸ As a result of this significant increase, the Legislative Services Agency estimates a \$57.9 million decrease in income tax revenue for the General Fund for fiscal year 2000.²⁹ A separate provision of the law makes this deduction permanent by deleting a previously established expiration date of December 31, 2000.³⁰

In addition to the increased deduction for dependents and the increased personal exemption amount, the general assembly increased the maximum allowable renter's deduction from \$1500 to \$2000.³¹ The deduction is available to taxpayers who rent a dwelling as their principle place of residence.³² Qualifying taxpayers may deduct the lesser of the actual rent paid or \$2000.³³

The general assembly enacted one law dealing with Indiana residents working in Illinois.³⁴ The new provision permits the IDSR to enter into a reciprocal agreement with Illinois for the payment of individual income taxes paid by residents of Indiana to Illinois and vice versa.³⁵ Under current Indiana law, nonresidents working in Indiana are excused from paying Indiana adjusted gross income tax if the nonresident's state of residence has a reciprocal exemption for Indiana residents working in that state.³⁶ Indiana had reciprocal agreements with Illinois, Kentucky, Michigan, Ohio, Pennsylvania, and Wisconsin.³⁷ However, Illinois terminated its prior agreement effective January 1, 1998.³⁸ The 1999 bill authorizes the IDSR to establish a method for

23. See Pub. L. No. 249-1999, § 1 (Ind. 1999) (codified at IND. CODE § 6-3-1-3.5(a)(5)(B) (Supp. 1999)).

24. See IND. CODE § 6-3-1-3.5(a)(3).

25. See *id.* § 6-3-1-3.5(a)(4)(B).

26. See S. 198, § 2, 111th Leg., 1st Reg. Sess. (Ind. 1999).

27. See IND. CODE § 6-3-1-3.5(a)(5).

28. See S. 297, § 2, 111th Leg., 1st Reg. Sess. (Ind. 1999).

29. See Legislative Services Agency, *Fiscal Impact Statement* (visited Apr. 8, 2000) <<http://www.state.in.us/legislative/bills/1999/PDF/FISCAL/SB0297.002.pdf>>.

30. See IND. CODE § 6-3-1-3.5(a)(5)(A) (as amended by Pub. L. No. 257-1999).

31. See *id.* § 6-3-2-6.

32. See *id.* § 6-3-2-6(a).

33. See *id.*

34. See *id.* § 6-3.5-3.

35. See *id.*

36. See *id.* § 6-3-5-1.

37. See IND. ADMIN. CODE tit. 45, r. 3.1-1-115 (1999).

38. See Legislative Services Agency, *Fiscal Impact Statement* (visited Apr. 8, 2000) <<http://www.state.in.us/legislative/bills/1999/PDF/FISCAL/HB1573.003.pdf>>.

calculating the payment to Illinois but sets a ceiling on the possible payment that Indiana may make under the new agreement.³⁹

The computation of adjusted gross income tax was also impacted by the tax provisions included in the state budget. Specifically, one provision removed the property tax "add-backs" which were previously available to individual and corporate taxpayers.⁴⁰ The same provision created a deduction available to individual taxpayers equal to the lesser of \$2500 or the amount of property taxes that are paid during the taxable year on the individual's principle place of residence.⁴¹ This new deduction essentially replaced the lost "add-back" for individuals. However, corporate taxpayers were not provided with a similar deduction.⁴² A separate provision removed the property tax add-back available to financial institutions that are subject to the financial institutions tax.⁴³

Finally, some miscellaneous changes were made to the Local Option Income Taxes.⁴⁴ One tax provision of the state budget made a technical change to the tax so that Marion County's special distribution will take into account the change of welfare costs from the county to the State.⁴⁵ A second provision changed the definition of "attributed levy" for the county adjusted gross income tax distributions for the county's welfare fund and welfare administration funds.⁴⁶ In addition, a separate bill provided that Hancock County could adopt the county economic development income tax and allocate up to .15% of the resulting revenue to library property replacement credits.⁴⁷

C. Tax Credits

In 1999, the general assembly repealed the earned income tax deduction and replaced it with a refundable earned income tax credit.⁴⁸ The eligibility requirements remain the same under the new format. However, only taxpayers with "Indiana total income" under \$12,000 and a "qualifying child" are eligible for the new credit.⁴⁹ Furthermore, at least 80% of the Indiana total income must be "earned income."⁵⁰ Separate provisions define Indiana total income, qualifying child, and earned income for purposes of the credit.⁵¹ The refundable

39. See IND. CODE § 6-3-5-3.

40. See *id.* § 6-3-1-3.5. The add back applied to taxes levied by a local government unit of any state. See *id.*

41. See *id.* § 6-3-1-3.5(a)(17).

42. See *id.* § 6-3-1-3.5.

43. See *id.* § 6-5.5-1-2.

44. See generally *id.* § 6-3.5.

45. See *id.* § 6-3.5-6-17.6.

46. See *id.* § 6-3.5-1.1-15.

47. See *id.* § 6-3.5-7-23.

48. See *id.* §§ 6-3-2.5-1 to -10 (1998), repealed by Ind. Pub. L. No. 273-1999, § 228.

49. See IND. CODE § 6-3.1-21-5 (Supp. 1999).

50. See *id.* § 6-3.1-21-5(3).

51. See *id.* §§ 6-3.1-21-3, 6-3.1-21-4, 6-3.1-21-2.

credit amount is 3.4% of the difference between the taxpayer's total income and \$12,000.⁵² Therefore, under the new credit system, a refund of \$408 would be available to a taxpayer with no Indiana income.⁵³

The general assembly also amended a statute to encourage more corporations and individuals to donate to an individual development fund account.⁵⁴ These accounts were established in 1997 to allow low-income individuals to deposit money into an account for education, housing, and business development purposes.⁵⁵ The qualifying individual's contributions are matched by the state and other entities.⁵⁶ Previously, to encourage contributions to the fund program, taxpayers who contributed at least \$1000 received a credit⁵⁷ against any gross, adjusted gross, or supplemental net income tax due.⁵⁸ The 1999 law lowered the minimum qualifying donation to \$100.⁵⁹ However, the bill did not increase the total allowable credit per taxpayer from the current \$50,000 maximum per year.⁶⁰

The Enterprise Zone ("EZ") credits were also affected by 1999 legislation.⁶¹ The 1999 law expanded the definition of a taxpayer under the existing statute to allow pass-through entities⁶² to take advantage of both the tax credit for increased employment expenditures in an EZ and the EZ loan interest credit.⁶³ Prior to the bill's enactment, the EZ credits were only available to c-corporations and sole proprietorships.⁶⁴

The increased employment expenditures credit may be used to offset gross income, adjusted gross income, insurance premium, or the financial institutions tax.⁶⁵ The credit equals the lesser of: 1) 10% of the qualified increased employment expenditures,⁶⁶ or 2) \$1500 multiplied by the number of qualified employees.⁶⁷ For purposes of the credit, qualified expenses are wages paid to employees living in the EZ and working for the taxpayer's trade or business that

52. See *id.* § 6-3.1-21-6.

53. $(0 - \$12,000) \times .034 = \408 .

54. See IND. CODE § 6-3.1-18-6 (1998), as amended by Ind. Pub. L. No. 4-1999, § 4.

55. See *id.* § 4-4-28-5.

56. See *id.* § 4-4-28-5(1).

57. The credit amount was unchanged. It remains at 50% of the qualified contribution. See *id.* § 6-3.1-18-6(a).

58. See *id.*

59. See *id.*

60. See *id.*

61. The EZ credits were created to encourage capital investments in economically depressed areas and to create jobs. See H.R. 1983, 111th Leg., 1st Reg. Sess. (Ind. 1999).

62. "Pass through entity" is defined as a: (1) corporation exempt from the AGI tax under IND. CODE § 6-3-2-2.8(2); (2) partnership; (3) trust; (4) limited liability company; or (5) limited liability partnership. IND. CODE § 6-3-3-10 (Supp. 1999).

63. See *id.* §§ 6-3-3-10, 6-3.1-7-1.

64. See *id.* § 6-3-3-10 (1998).

65. See *id.* § 6-3-3-10(a) (Supp. 1999).

66. See *id.* § 6-3-3-10(b)(1).

67. See *id.* § 6-3-3-10(b)(2).

is also located in the EZ.⁶⁸ Pass-through entities may claim the credit for employees first employed after December 31, 1998.⁶⁹

The enterprise zone interest credit allows a qualified lender to deduct 5%⁷⁰ of the loan interest received on loans made to benefit an EZ business or to repair real property located in an EZ.⁷¹ The provision also contains an amendment allowing the shareholder, partner, or member of the pass-through entity to receive the credit if the entity has no state tax liability to offset.⁷² In such a case, the percentage passed through to each individual member is equal to the percentage of the entity's distributive income to which the member is entitled.⁷³

D. Inheritance Tax

The general assembly enacted a new law dealing with certain procedural aspects of the Indiana inheritance tax.⁷⁴ Prior to enactment of the law, a person in control of a decedent's safety deposit box was required to notify the county assessor or an IDSR representative before opening the box.⁷⁵ The box was to be made available to the assessor or department representative so that the contents could be inventoried.⁷⁶ The 1999 bill deleted both of these requirements from the statute.⁷⁷

A second provision of the bill repealed two related statutory sections.⁷⁸ One section had prohibited the assessor or department representative from revealing any information gained in the examination of the safe deposit box.⁷⁹ The other repealed section made the reckless disclosure of this information by the state employees a class B misdemeanor.⁸⁰ With the elimination of the notification and examination requirements relating to the safe deposit boxes of decedents, these related statutory sections dealing with proscribed penalties were no longer necessary.

68. See *id.* § 6-3-3-10(a) (requiring that (1) the employee's principle residence in the EZ where he is employed; (2) 90% of employee's work is related to EZ business; (3) employee performs at least 50% of his work for the taxpayer in the EZ; (4) (if a pass through entity is seeking the credit) only wages paid after December 31, 1998 are eligible.).

69. See *id.*

70. See *id.* § 6-3.1-7-2(a).

71. See *id.* § 6-3.1-7-1.

72. See *id.* § 6-3.1-7-2(c).

73. See *id.* § 6-3.1-7-2(c)(2).

74. H.R. 1304, §§ 1, 2, 111th Leg., 1st Reg. Sess. (Ind. 1999).

75. See *id.* § 1.

76. See *id.*

77. See IND. CODE § 6-4.1-8-5 (Supp. 1999).

78. See H.R. 1304, § 2, 111th Leg., 1st Reg. Sess. (Ind. 1999).

79. See IND. CODE § 6-4.1-8-6 (1998).

80. See *id.* § 6-4.1-8-8.

E. Motor Carrier Fuel Use Tax

The general assembly enacted a law effecting the motor carrier fuel use tax.⁸¹ The law established a proportional use credit for fuel used to power equipment mounted on a motor vehicle.⁸² The credit is available where the equipment shares a common fuel tank with the vehicle on which it is mounted.⁸³ It applies only to that portion of the fuel used to power the mounted equipment.⁸⁴ However, the credit applies to such fuel whether consumed in Indiana or another state.⁸⁵ The credit is claimed on the motor carrier's quarterly return.⁸⁶

In order to qualify for the credit, the motor carrier must apply for certification with the IDSR and pay a one-time fee of \$7.⁸⁷ The motor carrier services division of the IDSR is responsible for issuing the certificates.⁸⁸ The IDSR determines the amount of the credit to approve subject to limitations on the aggregate amount of credits granted per quarter.⁸⁹ If claims submitted exceed the quarterly limit, they are to be paid on a pro rata basis.⁹⁰ If they are less than the quarterly limit, the difference is used to increase the allotment for the following quarter.⁹¹ However, the IDSR may not approve more than \$3.5 million of proportional use credits in a state fiscal year.⁹²

F. Tax Administration

A number of laws addressing tax administration were enacted in 1999. One law contained multiple provisions related to the administration of a new commercial vehicle excise tax.⁹³ The general assembly created this tax as a new "listed tax" as defined in the Indiana Code.⁹⁴ Under the previous vehicle tax system, vehicles with a weight of up to 11,000 pounds were taxable under the motor vehicle excise tax while vehicles above 11,000 pounds were subject to the personal property tax.⁹⁵ Effective January 1, 2000, an excise tax is imposed on

81. Indiana taxes motor carriers for the benefit of using its highways based on the number of gallons of fuel the carrier consumes on those highways during a tax year. *See id.* §§ 6-6-4.1-4(a), -4.5(a) (Supp. 1999).

82. *See id.* § 6-6-4.1-4(d).

83. *See id.*

84. *See id.*

85. *See id.*; *see also infra* Part II.G.

86. *See* IND. CODE § 6-6-4.1-4(d).

87. *See id.* § 6-6-4.1-4.7(c), (d).

88. *See id.* § 6-8.1-4-4.

89. The limit for the first quarter is \$1.375 million, second quarter \$625,000, third quarter \$625,000, 4th quarter \$875,000. *See id.* § 6-6-4.1-4.8(d)(1)-(4).

90. *See id.* § 6-6-4.1-4.8(c).

91. *See id.* § 6-6-4.1-4.8(d)(1)-(4).

92. *See id.* § 6-6-4.1-4.8(d).

93. *See* H.R. 2022, § 2, 111th Leg., 1st Reg. Sess. (Ind. 1999).

94. *See* IND. CODE § 6-8.1-1-1.

95. *See id.* § 6-6-5-1(i)(4).

commercial vehicles like trucks, tractors, trailers, and semi-trailers instead of a personal property tax.⁹⁶

The new excise tax is based on the weight of the vehicle and is paid at vehicle registration.⁹⁷ However, the tax imposed on farm vehicles is 50% of the tax on non-farm commercial vehicles of the same weight.⁹⁸ The statute sets out the commercial vehicle excise tax rates for the calendar year 2000 and provides the method for establishing the rate in later years.⁹⁹ Primary responsibility for the administration and collection of the new tax lies with the IDSR.¹⁰⁰ The motor carrier services division of the IDSR determines the amount of tax due on a commercial vehicle for a tax year.¹⁰¹ However, because the tax is collected at the time of vehicle registration, the Bureau of Motor Vehicles ("BMV") is required to collect the tax paid by owners of intrastate trucks registering in Indiana.¹⁰² The IDSR will collect the tax paid by owners of interstate trucks which are not registered with the BMV but instead under the International Registration Plan.¹⁰³ Any attempt to avoid the tax will subject the taxpayer to the same penalty as failing to file a tax return.¹⁰⁴ Furthermore, the commercial vehicle excise tax is exempted from the department's confidentiality statute and any information relating to the delinquency or evasion of the tax may be released to another state for the purpose of enforcement and collection.¹⁰⁵

G. Innkeeper's Tax and Other Local Taxes

The general assembly enacted one law with two key provisions affecting the innkeeper's tax of Vanderburgh County.¹⁰⁶ The innkeeper's tax is levied on those engaged in renting or furnishing rooms, lodgings, or accommodations for a period less than thirty days.¹⁰⁷ The 5% tax is imposed in addition to any applicable state sales tax.¹⁰⁸ Prior to the enactment of this law, 40% of the funds collected under this 5% tax were deposited in the county's visitor promotion fund and the remaining 60% to the tourism capital improvement fund.¹⁰⁹

The newly enacted bill requires that, beginning January 1, 2000, the 60%

96. See *id.* § 6-6-5.5-3(a).

97. See *id.* § 6-6-5.5-8(a).

98. See *id.* § 6-6-5.5-7.5.

99. See *id.* § 6-6-5.5-4.

100. See *id.* § 6-8.1-3-1(a).

101. See *id.* § 6-8.1-4-4.

102. See *id.* § 6-8.1-3-1(c).

103. See *id.*

104. See *id.* § 6-8.1-5-2(d).

105. See *id.* § 6-8.1-7-1(j), (k).

106. See H.R. 1458, 111th Leg., 1st Reg. Sess. (Ind. 1999).

107. See IND. CODE § 6-9-2.5-6 (1998).

108. See *id.*

109. See *id.* § 6-9-2.5-7, -7.5.

distribution to the tourism capital improvement fund will be decreased to 20%.¹¹⁰ The funds making up the 40% reduction will instead be distributed to the new convention center operating fund that was created by a second provision of the law.¹¹¹ This new fund will be used solely to pay for operating expenses of Vanderburgh county's convention center.¹¹² This new distribution formula will be effective between January 1, 2000, and December 31, 2005.¹¹³ At that point, the convention center operating fund will be dissolved and the funds will again be distributed to the tourism capital improvement fund.¹¹⁴

Two other counties also had their innkeeper's statutes amended by the general assembly in 1999. Under one law, the Vigo County Council was permitted to increase its innkeeper's tax rate ceiling from 2% to a maximum of 5%.¹¹⁵ A separate law addressed the possible uses of funds collected under Jackson county's innkeeper's tax.¹¹⁶ The law added a separate chapter to the Indiana Code specifically addressing Jackson county which had been collecting the tax under the Uniform County Innkeeper's tax.¹¹⁷ The tax rate and collection procedures were not changed. However, the law does allow Jackson County to spend up to 25% of the collected funds on economic and industrial development.¹¹⁸ Under the prior law, the county could only use the funds to promote conventions and tourism.¹¹⁹

H. Miscellaneous Provisions

There were several laws passed which contained provisions impacting state tax issues that do not fall within the broad categories previously addressed. In one law, the general assembly altered the procedure for obtaining a mobile home transportation permit from the motor carrier services division of the IDSR.¹²⁰ Under the previous system, a manufacturer had to obtain a separate permit for each trip at a cost of \$10 or \$18 per trip.¹²¹ The cost and the processing time led some manufacturers to transport mobile homes without obtaining the permits. The new provision was intended to increase compliance with the permit

110. *See id.* § 6-9-2.5-7.5 (Supp. 1999).

111. *See id.* § 6-9-2.5-7.7.

112. *See id.*

113. *See id.*

114. *See id.* § 6-9-2.5-7.5.

115. *See id.* § 6-9-11-6.

116. *See* H.R. 1074, § 1, 111th Leg., 1st Reg. Sess. (Ind. 1999) (codified at IND. CODE § 6-9-32 (Supp. 1999)).

117. *See* IND. CODE § 6-9-32-1.

118. *See id.* § 6-9-32-4(c)(2).

119. *See id.* § 6-9-18-6(a)(6).

120. *See* H.R. 1130, §§ 1, 2, 111th Leg., 1st Reg. Sess. (Ind. 1999).

121. *See* IND. CODE §§ 9-20-15-1, -4 (1998); State of Indiana, *Oversize/Overweight Vehicle Permitting Handbook* at 65 (visited Apr. 9, 2000) <<http://www.state.in.us/dor/mcs/pdf/osowhandbook.pdf>>.

requirement by reducing these burdens.¹²²

The new provision allows a manufacturer of mobile homes to obtain an annual permit for moving a mobile home from the manufacturing site to a storage facility.¹²³ The annual permit is \$40 for each three-mile increment the mobile home rig is transported.¹²⁴ The maximum distance the rig may be transported is fifteen miles.¹²⁵ Consequently, the maximum annual fee may not exceed \$200.¹²⁶

One other bill dealing with motor carrier services was enacted by the general assembly. Prior to this amendment, all intrastate motor carriers not operating under authority granted by the United States Department of Transportation were required to register with the IDSR as an intrastate motor carrier. Under the first provision of the bill, farm vehicles operated in connection with agricultural pursuits were exempted from that registration requirement.¹²⁷ The second provision added a new section to the statute giving the IDSR or the state police the authority to confiscate registrations, license plates, and cab cards.¹²⁸ The authority exists where the United States Department of Transportation or the Federal Highway Administration issues an operations out of service order (safety related order?) affecting a motor carrier operating in Indiana.¹²⁹

The general assembly enacted one bill containing two provisions dealing with the annual registration fee for underground storage tanks.¹³⁰ This fee is collected from a petroleum marketer or retailer who owns or operates an underground storage tank on July of the applicable tax year.¹³¹ Under the bill, the amount of the fee was decreased from \$290 to \$90.¹³² The bill also decreased the amount of the storage tank fee that is deposited into the underground storage tank excess liability trust fund from \$245 to \$45.¹³³ Therefore, under the new system, \$45 of the fee is deposited into the excess liability trust fund and \$45 is deposited into the petroleum trust fund.¹³⁴

One bill enacted during 1999 was prompted by recent settlements between tobacco retailers and the state governments.¹³⁵ Under provisions of this bill, the general assembly recognized the extreme financial burden that is placed on the state from the treatment of cigarette smokers with health problems.¹³⁶ In an effort

122. See IND. CODE § 9-20-15-2.1 (Supp. 1999).

123. See *id.*

124. See *id.* § 9-29-6-12.

125. See *id.*

126. See *id.*

127. See *id.* § 8-2.1-24-18.

128. See *id.* § 8-2.1-24-28.

129. See *id.*

130. See H.R. 1578, §§ 4, 5, 111th Leg., 1st Reg. Sess. (Ind. 1999).

131. See IND. CODE § 13-23-12-1 (Supp. 1999).

132. See *id.*

133. See *id.* § 13-23-12-4.

134. See *id.*

135. See H.R. 1870, 111th Leg., 1st Reg. Sess. (Ind. 1999).

136. See IND. CODE § 24-3-3-1 added by Ind. Pub. Law 223-1999, § 1.

to insure that this burden is placed on the tobacco product manufacturers, in accordance with the "Master Settlement Agreement,"¹³⁷ the general assembly has required a reserve fund be established.¹³⁸ Those tobacco manufacturers who are not participants of the MSA must contribute annually to the reserve fund.¹³⁹ The contribution is based on the number of units sold in the state during the tax year.¹⁴⁰ The statute provides the required contribution per unit for years beginning in 1999 through and beyond the year 2007.¹⁴¹ The contribution rate is adjusted each year for inflation.¹⁴²

A final bill worth noting allows an advisory commission to designate two areas within Delaware county as community revitalization enhancement districts.¹⁴³ Taxpayers investing in property within these districts can utilize the community revitalization tax credit against certain state and local tax liabilities.¹⁴⁴ This credit was created by the general assembly in 1998 to encourage economic development within the districts.¹⁴⁵ It equals 25% of the qualified investments made for the rehabilitation or redevelopment of property located within the district.¹⁴⁶

Under the previous version of the statute, the designation as a "district" for purposes of the credit was only available to counties with a population between 108,950 and 112,000, e.g. Monroe county.¹⁴⁷ Because of the general assembly's most recent additions to the statute, a county with a population between 112,000 and 125,000, e.g. Delaware county, is eligible for the designation as well.¹⁴⁸ Under the law, eligible counties are allowed to retain up to \$1 million of the incremental taxes generated annually by the development in the enhancement districts.¹⁴⁹ These funds are then transferred to the districts' industrial development fund.¹⁵⁰

137. On November 23, 1998, leading United States tobacco product manufactures entered into a settlement agreement, entitled the "Master Settlement Agreement" with the state. Under this agreement, these manufacturers, in return for release of past, present, and certain future claims are required to make certain payments. *See id.* § 24-3-3-1(5).

138. *See id.* § 24-3-3-1(6).

139. *See id.* § 24-3-3-12.

140. *See id.*

141. *See id.*

142. *See id.*

143. *See* §. 19, §§ 1-6, 111th Leg., 1st Reg. Sess. (Ind. 1999).

144. *See* IND. CODE § 6-3.1-19-3(a) (1998); *see also id.* § 36-7-13-2.4 (West 1999).

145. *See id.* § 6-3.1-19-3(a).

146. *See id.* § 6-3.1-19-2; *see also id.* § 6-3.1-19-2 (1998).

147. *Id.* § 36-7-13-12(b)(5).

148. *See id.* § 36-7-13-10 (Supp. 1999).

149. *See id.* § 36-7-13-14.

150. *See id.* § 36-7-20-14.

II. INDIANA TAX COURT DECISIONS

A. *Indiana Property Taxes—Real Property Taxes*

In *State Board of Tax Commissioners v. Town of St. John* ("St. John V"),¹⁵¹ the Indiana Supreme Court considered the tax court's ruling that the Indiana statute¹⁵² and related regulations¹⁵³ governing real property valuation for assessment purposes violated the Indiana constitution. The case initially arose when residents of the town of St. John and Marion County challenged the constitutionality of Indiana's property tax system.¹⁵⁴ In *St. John I*, the tax court found the system unconstitutional concluding that the Indiana Constitution requires an absolute and precise fair market value system.¹⁵⁵ The Indiana Supreme Court reversed, holding that a system based on fair market value was not required.¹⁵⁶ However, it remanded the case for a determination of whether Indiana's system provided a "uniform and equal rate of property assessment and taxation based on property wealth"¹⁵⁷ as required by article X, section 1(a) ("the Property Taxation Clause")¹⁵⁸ of the Indiana Constitution.

On remand, the tax court issued a preliminary opinion finding that the statute and related regulations governing Indiana's property tax valuation system violated the uniformity and equality requirements of the Property Taxation Clause.¹⁵⁹ It ordered the state board to "make future real property assessments for purposes of taxation under a system that incorporates an objective reality."¹⁶⁰ In its final judgment, the tax court specifically ordered the state board to consider all competent evidence of property wealth in appeals filed with the county review boards on or after May 11, 1999.¹⁶¹ The state board appealed the decision to the Indiana Supreme Court.¹⁶²

151. 702 N.E.2d 1034 (Ind. 1998).

152. See IND. CODE § 6-1.1-31-6(c) (1998).

153. See, e.g., IND. ADMIN. CODE tit. 50, r. 2.2-7-11, r. 2.2-8-7, r. 2.2-9-6 (1996).

154. See *Town of St. John v. State Bd. of Tax Comm'rs*, 665 N.E.2d 965 (Ind. Tax Ct.) ("St. John I"), *rev'd sub nom. Boehm v. Town of St. John*, 675 N.E.2d 318 (Ind. 1996).

155. See *id.* at 974.

156. See *Boehm*, 675 N.E.2d at 328 ("St. John II").

157. *Id.*

158. The Property Tax Clause states: "The General Assembly shall provide, by law, for a uniform and equal rate of property assessment and taxation and shall prescribe regulations to secure a just valuation for taxation of all property, both real and personal." IND. CONST. art. X, § 1(a).

159. See *Town of St. John v. State Bd. Of Tax Comm'rs*, 690 N.E.2d 370, 398 (Ind. Tax Ct. 1997) ("St. John III"), *rev'd in part*, 702 N.E.2d 1034 (Ind. 1998).

160. *Id.*

161. See *Town of St. John v. State Bd. Of Tax Comm'rs*, 691 N.E.2d 1387, 1390 (Ind. Tax Ct.) ("St. John IV"), *rev'd in part*, 702 N.E. 1034 (Ind. 1998).

162. The preliminary opinion rendered in *St. John III* and the final judgment of *St. John IV* were considered as a single appeal by the Indiana Supreme Court in *St. John V*. See *St. John V*, 702 N.E.2d at 1036 n.1.

In *St. John V*, the Indiana Supreme Court reversed that portion of the tax court's decision that declared section 6-1.1-31-6(c)¹⁶³ of the Indiana Code unconstitutional.¹⁶⁴ The supreme court suggested that the tax court misinterpreted the statute as prohibiting the use of fair market value as "true tax value."¹⁶⁵ The court agreed that the statute would be unconstitutional if interpreted as an absolute prohibition.¹⁶⁶ However, it determined that the statute should instead be interpreted merely to instruct that "true tax value" is not exclusively or necessarily identical to fair market value.¹⁶⁷

In support of this interpretation, the court referred to other statutory provisions which suggest that the assessment regulations were meant to accommodate "unenumerated factors" that the state board considered proper in determining the true tax value of assessed property.¹⁶⁸ The Indiana Supreme Court concluded that the statute did not prohibit the state board from promulgating regulations based on property wealth.¹⁶⁹ Based on this conclusion, the court held that the statute was not unconstitutional simply because the state board did not consider fair market value to be a proper factor to be considered in arriving at true tax value.¹⁷⁰

Next, the supreme court reviewed the constitutionality of the cost schedules used in arriving at the true tax value for property assessments.¹⁷¹ By regulation, the true tax value of an improvement is the cost of reproduction minus physical or obsolescence depreciation.¹⁷² The cost of reproduction to be applied in assessments is not the actual cost of reproducing an item, but rather the "reproduction cost" as specified in the state board's cost schedules.¹⁷³ The cost schedules are classified into different types of improvements and each is assigned a representative model.¹⁷⁴ The models feature amenities that are assumed to exist in the improvement type they represent.¹⁷⁵ If an amenity does not exist in the property being assessed, or if additional amenities are present, then the value of

163. Section 6-1.1-31-6(c) of the Indiana Code governs real property tax valuation for assessment purposes. The statute states: "(c) With respect to the assessment of real property, true tax value does not mean fair market value. True tax value is the value determined under the rules of the state board of tax commissioners." IND. CODE § 6-1.1-31-(6)(c) (1998).

164. See *St. John V*, 702 N.E.2d at 1038.

165. *Id.*

166. See *id.*

167. *Id.*

168. *Id.* (citing IND. CODE §§ 6-1.1-31-6(a)(1)(ix), 6-1.1-31-6(a)(2)(viii), 6-1.1-31-6(b)(7), 6-1.1-31-5(b)).

169. See *id.*

170. See *id.*

171. See *id.*

172. See IND. ADMIN. CODE tit. 50, r. 2.2-2-1(c), 2.2-7-9 (1996).

173. *Id.* tit. 50, r. 2.2-7-7.1(f)(8).

174. See *St. John III*, 690 N.E.2d 370, 374 (Ind. Tax Ct. 1997), *rev'd in part*, *St. John V*, 702 N.E.2d at 1034.

175. See *id.*

the subject property is adjusted upward or downward to reflect the lack of similarity to the model.¹⁷⁶

The tax court had concluded that the state board's cost schedules violated the Property Tax Clause of the Indiana Constitution because the schedules did not result in a uniform and equal rate of property assessment and taxation and did not accurately measure property wealth.¹⁷⁷ It held that the system must be based on objectively verifiable data to ensure that these constitutional requirements are met and that individual taxpayers have a means to assert a personal right to uniformity and equality as to individual assessments.¹⁷⁸

The court agreed that the Property Taxation Clause requires the General Assembly to provide for a system of assessment and taxation characterized by uniformity, equality, and just valuation based on property wealth.¹⁷⁹ However, it held that the Clause does not require absolute and precise exactitude as to the uniformity and equality of each individual assessment.¹⁸⁰ Furthermore, it held that the Clause does not create a personal, substantive right of uniformity and equality.¹⁸¹

The court referred to the Constitutional Convention of 1850-1851 to illustrate that the delegates "did not expect the full achievement of absolute and precise exactitude"¹⁸² but, rather, considered the Clause aspirational in nature.¹⁸³ It then likened the Property Tax Clause to other constitutional provisions that affirmatively require the legislature, by delegation, to enact laws for specified public purposes, but do not create entitlement rights for individuals.¹⁸⁴

Finally, the court reversed the tax court's order to the state board to "make future real property assessments . . . under a system that incorporates an objective reality" and to "consider all competent real world evidence presented to the state board by persons filing appeals . . . on or after May 11, 1999."¹⁸⁵ The court based its decision on its conclusion that the Property Taxation Clause of the Indiana Constitution does not establish a substantive right to individual assessments nor does it mandate the consideration of independent property wealth evidence in individual tax appeals.¹⁸⁶

176. *See id.*

177. *See id.* at 382.

178. *See id.* at 376 & n.12.

179. *See St. John V*, 702 N.E.2d 1034, 1040 (Ind. 1995).

180. *See id.*

181. *See id.*

182. *Id.* at 1040 (citing *St. John II*, 675 N.E.2d 318, 323 (Ind. 1996)).

183. *See id.*

184. *See id.*

185. *Id.*

186. *See id.*

B. Indiana Property Taxes—Business Real Property Taxes

In *Whitley Products, Inc. v. State Board of Tax Commissioners*,¹⁸⁷ the tax court ruled against Whitley Products (“the taxpayer”) in its appeal of a real estate assessment because it failed to provide probative evidence at the administrative level to support its position.¹⁸⁸ The case involved the assessment of an improvement to land located in Marshall County, Indiana.¹⁸⁹ The improvement was comprised of three sections that were assessed separately.¹⁹⁰ As background, the court explained that assessing an improvement under Indiana’s True Tax Value system involves the use of cost schedules to determine the base reproduction cost of the improvement.¹⁹¹ The assessor then assigns a grade based on the improvements materials, design, and workmanship.¹⁹² The grade is used to increase or decrease the total assessed value from the pre-graded base reproduction cost.¹⁹³

In this case, Whitley Products, Inc. (“Whitley”) was granted a review of its assessment from the state board even though no probative evidence of any error was presented.¹⁹⁴ The review revealed errors in the assessment and resulted in lower grades for two of the three sections.¹⁹⁵ Still unsatisfied with the assessment, Whitley appealed the state board’s final determination.¹⁹⁶ At trial before the tax court, Whitley argued that the state board failed to consider the quality of the materials and workmanship of the improvement when evaluating the grades.¹⁹⁷ The tax court affirmed the state board’s final determination even though trial testimony revealed inconsistencies in the state board’s final determination.¹⁹⁸ The court disregarded the disparity because Whitley failed to present evidence to the state board regarding the original alleged error.¹⁹⁹

The court explained that a taxpayer who challenges a real property assessment is responsible for bringing any errors in that assessment to the state

187. 704 N.E. 2d 1113 (Ind. Tax Ct. 1998), *review denied*, 714 N.E.2d 174 (Ind. 1999) (mem.).

188. *See id.* at 1122.

189. *See id.* at 1115.

190. *See id.*

191. *See id.* at 1116.

192. *See id.*

193. *See id.*

194. *See id.*

195. *See id.* The lower grades benefitted the taxpayer because they resulted in a lower assessed value for the improvement. *See id.* at 1120.

196. *See id.* at 1116.

197. *See id.*

198. *See id.* at 1118. The state board hearing officer testified that she did not consider the quality of the materials and workmanship in lowering the grades of the two sections of the improvement. However, the state board’s final determination refers to both as reasons for the reduced grades. *See id.*

199. *See id.* at 1118-19.

board's attention.²⁰⁰ It agreed that the state board, as an administrative agency, needs substantial evidence to support its decisions.²⁰¹ However, the court noted that Indiana case law clearly requires that a taxpayer do more than simply allege that an error exists in the assessment to trigger the state board's evidentiary burden.²⁰² A taxpayer must offer probative evidence regarding the alleged error.²⁰³

In this case, the taxpayer did not present any probative evidence to the state board regarding the grading of its improvement.²⁰⁴ It offered only a conclusory statement that the improvement's grading was inaccurate given its construction and features.²⁰⁵ The court held that this did not trigger the substantial evidence standard and, therefore, the state board could have simply refused to review the assessment.²⁰⁶ It explained that if a taxpayer was never entitled to a review, that taxpayer will not later be granted a reversal of the resulting determination if such a review is nevertheless granted.²⁰⁷

The court justified what it called a "somewhat harsh result" by suggesting that forgiving the failure to present evidence would shift the taxpayer's responsibility for making its case to the state board.²⁰⁸ Furthermore, it explained that Indiana's property tax system is most efficiently administered when the detailed factual presentations are made directly to the state board, Indiana's property tax experts.²⁰⁹ Finally, it pointed out that the taxpayer in this case was not prejudiced by the holding; rather, it benefited from the lower grade assigned after the state board's review.²¹⁰

Whitley also argued that the determination should be reversed because the grade regulations, in violation of Indiana's State Constitution, establish no ascertainable standards for the court to follow in reviewing the determination.²¹¹ The court rejected this argument as well.²¹² It agreed that these regulations were nearly identical to the 1995 general reassessment regulations that were declared unconstitutional.²¹³ However, the court reiterated that the present regulations must be used until the new regulations are in place and their constitutionality cannot be the sole basis for reversing a determination.²¹⁴

200. *See id.* at 1119.

201. *See id.*

202. *See id.*

203. *See id.*

204. *See id.*

205. *See id.*

206. *See id.* at 1120.

207. *See id.*

208. *Id.*

209. *See id.*

210. *See id.*

211. *See id.* at 1121.

212. *See id.*

213. *See id.*

214. *See id.*

In *CGC Enterprises v. State Board of Tax Commissioners*,²¹⁵ the owner²¹⁶ of an apartment building challenged the state board's choice of pricing model used in assessing its property.²¹⁷ The apartment building was assessed using a "residential pricing model with a row-type adjustment" ("row-type adjustment").²¹⁸ CGC argued that a General Commercial Residential ("GCR")²¹⁹ pricing model should have been used.²²⁰

CGC raised two issues on appeal before the tax court. First, it cited the regulation governing row-type adjustments in arguing that the apartment building lacked a necessary characteristic required for assessment under that model.²²¹ This regulation states that "Row-Type units, because they can be owned individually, shall be priced uniformly as individual dwelling units. . . ."²²² CGC suggested that the "can be owned individually" language established a requirement for assessment under that schedule.²²³

At its trial before the tax court, CGC offered a city ordinance purporting to prove that the individual units of its property could not be owned individually.²²⁴ The state board objected to the presentation of the ordinance because it had not been presented at the administrative level.²²⁵ In response, CGC argued that the ordinance constituted law that governed the case and could therefore be considered by the court even though it had not first been presented to the state board.²²⁶ The court upheld the objection noting CGC's failure to provide authority in its brief regarding the admissibility of the ordinance.²²⁷

215. 714 N.E.2d 801 (Ind. Tax Ct. 1999).

216. The opinion addressed a consolidated appeal filed by Columbus Village Apartments and CGC Enterprises. This Article refers only to CGC. However, both parties raised identical factual and legal issues in the actual appeal.

217. Indiana uses the "model method" of assessing improvements to real property. These models represent possible "use-types" for improvements. Each model is subject to a specific pricing schedule based on the construction elements assumed to exist in that type of improvement. Under this method, the assessor chooses that model which most closely matches the physical characteristics of the subject improvement and then adjusts that cost to account for specified variations between the subject improvement and the model. IND. ADMIN. CODE tit. 50, r. 2.2-1-37 (1996), r. 2.2-10-6.1(a).

218. Residential "row type" dwellings are multiple family dwellings, meaning two (2) or more individual units, which are separated vertically by common or party walls. *Id.* tit. 50, r. 2.2-7-8.1.

219. Because of the number of commercial and industrial models, they are organized into three major categories: General Commercial Mercantile, General Commercial Industrial, and General Commercial Residential (GCR). *See id.* tit. 50, r. 2.2-10-6.1(a)(1).

220. *See CGC Enters.*, 714 N.E.2d at 802.

221. *See id.* at 803.

222. *Id.* (quoting IND. ADMIN. CODE tit. 50, r. 2.2-7-8.1 (1996)).

223. *Id.* at 802.

224. *See id.*

225. *See id.* (citing IND. CODE § 33-3-5-14 (Supp. 1996)).

226. *See id.*

227. *See id.*

Finally, CGC argued that its property should have been assessed using the GCR pricing schedule because the property consisted of multiple units, each of which was rented out to tenants.²²⁸ It referenced language of the GCR pricing regulations which indicate that GCR models include apartments and commercial flats.²²⁹ The court rejected this argument as well explaining that the state board has the discretion to choose the pricing model it feels most closely fits the subject property.²³⁰ It noted that the use of the property is only a starting point and is not a determinative factor in selecting the appropriate pricing schedule.²³¹

*C. Indiana Property Taxes—Business
Real Property Taxes ("Obsolescence Adjustment")*

In *Pedcor Investments-1990-XIII, L.P. v. State Board of Tax Commissioners*,²³² the owner of a low-income apartment complex sought an adjustment of its property tax assessment to recognize an alleged decrease in value caused by a deed restriction.²³³ *Pedcor Investments-1990-XIII, L.P.* ("Pedcor") had entered into an agreement with the City of Franklin, Indiana to build an apartment complex for low and moderate-income tenants.²³⁴ The agreement contained a deed restriction requiring forty percent of the rental units to be rented to such tenants at a rate fixed below the market rate.²³⁵ However, by entering into the agreement, Pedcor was able to take advantage of federal tax incentives designed to encourage the production of affordable housing for low-income individuals.²³⁶

Under Indiana's property tax system, a commercial improvement's True Tax Value is its reproduction cost minus physical depreciation and obsolescence depreciation.²³⁷ An adjustment for obsolescence depreciation recognizes

228. See *id.* at 804.

229. See *id.* (citing IND. ADMIN. CODE tit. 50, r. 2.1-4-3(a) (1996)).

230. See *id.* (citing *Bender v. State Bd. of Tax Comm'rs*, 676 N.E.2d 1113, 1116 (Ind. Tax Ct. 1997)).

231. See *id.* (citing *Herb v. State Bd. of Tax Comm'rs*, 656 N.E.2d 890, 893 (Ind. Tax Ct. 1995)).

232. 715 N.E.2d 432 (Ind. Tax Ct. 1999).

233. Pedcor appealed two assessments. A March 1, 1992 assessment fixed the value of the land and the apartment complex while the complex was still under construction. See *id.* at 434. On March 1, 1993 a second assessment fixed the value of the land and the fully completed complex. See *id.* The appeals were consolidated. See *id.* at 435. Pedcor argued the impact of the deed restriction in disputing both assessments. See *id.* This Article addresses that issue only. A second argument regarding a one-time adjustment for the assessment done when the complex was under construction will not be addressed. See *id.* at 440.

234. See *id.* at 434.

235. See *id.*

236. See *id.*; see also I.R.C. 42 (West 1988 & Supp. 1999).

237. See *Pedcor Investments*, 715 N.E.2d at 435 (citing IND. ADMIN. CODE tit. 50, r. 2.1-5-1 (1992) (codified in present form at *id.* r. 2.2-10-7(f) (1996))).

functional or economic losses of value.²³⁸ A functional loss of value is caused by factors internal to the property while an economic loss of value is caused by external factors.²³⁹ According to *Pedcor*, because the deed restriction required that forty percent of the units were to be rented below the market rate, it caused an economic loss of value in the form of lost rental income.²⁴⁰ Furthermore, it argued that the existence of the low-income units decreased the desirability of the other units causing the complex to experience additional economic obsolescence.²⁴¹ According to *Pedcor*, these external factors justified an obsolescence adjustment to the property assessment.²⁴²

In support of its final determination, the state board argued that the deed restriction could not constitute economic obsolescence because it was not external to the property.²⁴³ Alternatively, it argued that an adjustment for obsolescence is not warranted because any loss of value was caused by a deed restriction entered into voluntarily by the property owner.²⁴⁴ The court found no merit in these two arguments.²⁴⁵ It explained that the external factor at work in such a case is not the deed restriction itself but rather the marketplace's reaction to that restriction.²⁴⁶ It also held that a deed restriction that causes property to lose value does not have a different effect merely because the owner entered into the restriction voluntarily.²⁴⁷

The court upheld the state board's final determination based on its third argument.²⁴⁸ The Board suggested that the proposed assessment adjustment was inappropriate because the deed restrictions did not cause the apartment complex economic obsolescence.²⁴⁹ It justified this conclusion by explaining that to accurately determine whether the deed restrictions resulted in obsolescence, the financial benefits provided by the resulting tax incentives must be accounted for.²⁵⁰ According to the state board, these benefits counteracted any decrease in income caused by the restrictions.²⁵¹ Therefore, the complex actually experienced no economic obsolescence.²⁵²

The court rejected *Pedcor*'s argument that any benefits from the tax

238. See IND. ADMIN. CODE tit. 50, r. 2.2-10-7 (1996). The issue of physical depreciation was not involved in *Pedcor* and will, therefore, not be discussed in this Article.

239. See *id.*

240. See *Pedcor*, 715 N.E.2d at 436.

241. See *id.*

242. See *id.*

243. See *id.*

244. See *id.*

245. See *id.*

246. See *id.* at 437.

247. See *id.*

248. See *id.* at 439.

249. See *id.* at 437.

250. See *id.*

251. See *id.*

252. See *id.*

incentives were speculative because they are subject to recapture if the apartment complex stopped renting to low-income tenants.²⁵³ It explained that the argument itself speculated that Pedcor would stop renting to low-income tenants.²⁵⁴ Furthermore, it found the point moot because the tax benefits were established for the tax years in issue.²⁵⁵ The court also suggested that if Pedcor stopped renting to low-income tenants, it would likely have additional rental income as a result of increasing its rates to market value.²⁵⁶ The court held that in light of the state board's conclusion about the tax incentives, Pedcor was obligated to present evidence demonstrating that benefits did not make up for the loss of value caused by the restrictions.²⁵⁷ Because no such evidence was shown, the final determination was upheld.²⁵⁸

In *Phelps Dodge v. State Board of Tax Commissioners*,²⁵⁹ the court held that it will not consider taxpayer complaints concerning influence factors in cases where the state board holds a hearing concerning an assessment unless the taxpayer has presented probative evidence that would support an application of a negative influence factor and a quantification of that influence factor at the administrative level.²⁶⁰ Phelps Dodge ("Phelps") appealed the final determination of the state board regarding the assessment of two parcels of land it owned.²⁶¹ The case focused on the obsolescence depreciation applied to the improvements in the state board's final determination.²⁶² Phelps argued that the state board did not have substantial evidentiary support for (1) its quantification of the improvements' obsolescence, (2) its determination of the improvements' condition, and (3) its quantification of certain "negative influence" factors.²⁶³ Additionally, Phelps argued that the state board incorrectly determined the age of the improvements and used the wrong tables in determining the amount of physical depreciation for the improvements.²⁶⁴

The court first considered whether the state board had substantial evidentiary support for its decision to quantify the obsolescence of the improvements located on the two parcels.²⁶⁵ It started its analysis by referring to the two-step process for determining obsolescence.²⁶⁶ Under this analysis, the assessor must identify

253. See *id.* at 438.

254. See *id.*

255. See *id.*

256. See *id.* at 438 n.12.

257. See *id.* at 439.

258. See *id.*

259. 705 N.E.2d 1099 (Ind. Tax Ct.), review denied, 726 N.E.2d 297 (Ind. Ct. App. 1999).

260. See *id.* at 1106.

261. See *id.* at 1101.

262. See *id.* at 1102.

263. *Id.* at 1101.

264. See *id.*

265. See *id.* at 1102.

266. See *id.* (citing *Clark v. State Bd. of Tax Comm'rs*, 694 N.E.2d 1230 (Ind. Tax Ct. 1998)).

the cause of the obsolescence and then quantify the amount of obsolescence to apply.²⁶⁷ The court explained that the regulation's lack of guidance on how to quantify the obsolescence of a particular improvement did not release the state board of its responsibility to support the quantification with substantial evidence.²⁶⁸ Therefore, the court remanded the issue for further consideration because neither party offered any evidence on the quantification of the obsolescence of the improvements.²⁶⁹

The court next considered Phelps's contention that the state board lacked substantial evidentiary support for its determination of the improvements' condition.²⁷⁰ The court summarized Phelps's argument to suggest that such determinations are per se reversible because they are based on regulations that lack ascertainable standards and therefore violate the State Constitution of Indiana.²⁷¹ In rejecting this argument the court reiterated its position that an assessment will not be reversed on this basis alone.²⁷² It explained that property assessments must continue under the old regulations until new regulations are in place.²⁷³ Therefore, to have an assessment reversed, the taxpayer must present probative evidence of the alleged error.²⁷⁴ In this case, Phelps presented no such evidence.²⁷⁵ The court provided several examples including evidence of physical deterioration, evidence of the condition of comparable properties, and evidence establishing the amount of maintenance needed to restore the improvement to perfect condition.²⁷⁶

The court explained that land values for a neighborhood are developed by analyzing comparable sales data for the neighborhood and surrounding area.²⁷⁷ After this analysis, the state board sets the final values in a "Land Order."²⁷⁸ However, the Land Order values for properties with certain unique characteristics can be adjusted upward or downward by applying influence factors.²⁷⁹ These factors allow an assessor to recognize a property that should not simply be lumped in with its surrounding neighborhood for valuation purposes.²⁸⁰

267. See *id.* (citing *Clark*, 694 N.E.2d at 1238).

268. See *id.* (citing *Clark*, 694 N.E.2d at 1230).

269. See *id.* at 1103.

270. See *id.* An improvement's True Tax Value for purposes of the Indiana property tax assessment is adjusted by a percentage based on age and condition. See *id.* (citing IND. ADMIN. CODE tit. 50, r. 2.1-5-1(1992) (codified in present form at IND. ADMIN. CODE r. 2.2-12-4(c) (1996)).

271. See *id.*

272. See *id.* at 1104 (citing *Whitley Prods., Inc. v. State Bd. of Tax Comm'rs*, 704 N.E.2d 1113, 1121 (Ind. Tax Ct. 1998)).

273. See *id.* at 1104 (citing *Whitley Prods., Inc.*, 704 N.E.2d at 1121).

274. See *id.*

275. See *id.* at 1105.

276. See *id.* at 1104.

277. See *id.* at 1105.

278. *Id.*

279. See *id.*

280. See *id.*

In *Phelps*, the state board applied negative influence factors to the properties but offered no evidence of how the factors were calculated.²⁸¹ The court cited this failure in light of the state board's obligation to support its decisions with substantial evidence and remanded the issue so that the negative influence factors could be quantified.²⁸²

Finally, the court held that the issues of whether the state board correctly determined the age of the improvements and whether it used the proper depreciation tables were waived.²⁸³ It explained that under section 33-3-5-14 of the Indiana Code, the court may not address issues that were not raised at the administrative level.²⁸⁴ In this case, *Phelps* did not present the issues at the state board hearing; rather, they were first raised in its post-trial brief.²⁸⁵ Accordingly, the court affirmed the state board's determinations.²⁸⁶

D. Indiana Property Taxes—Business Personal Property Tax

In Indiana, tangible personal property held, used, or consumed in connection with the production of income is subject to property tax.²⁸⁷ Liability for this tax may fall on either the owner or the possessor of the property.²⁸⁸ For personal property tax purposes, the Indiana legislature has defined the term "owner" as the legal title holder to the property.²⁸⁹ However, when tangible personal property is security for a debt and the debtor is in possession of the property, the debtor is the owner of that property.²⁹⁰ In *W.H. Paige & Co. v. State Board of Tax Commissioners*,²⁹¹ the tax court was asked to determine whether a rent-to-own lease agreement constituted such a security interest thereby relieving the lessor of both the designation of "owner of the subject matter" and the resulting property tax liability which follows that designation.

W.H. Paige & Co. ("Paige") appealed a final determination of the state board assessing personal property tax on musical instruments it leased to customers under its "Monthly Rent-to-Own Program" ("program").²⁹² The program consisted of a mandatory fixed trial rental period followed by an optional month-to-month renewable lease.²⁹³ Under the terms of the program, customers could

281. See *id.* at 1106.

282. See *id.*

283. See *id.*

284. See *id.* at 1107 (citing IND. CODE ANN. § 33-3-5-14 (West Supp. 1996)).

285. See *id.*

286. See *id.*

287. See IND. CODE §§ 6-1.1-1-11, -19 (1998).

288. See *id.* § 6-1.1-1-2-4.

289. *Id.* § 6-1.1-1-9(b) (1998).

290. See *id.* § 6-1.1-1-9(e).

291. 711 N.E.2d 552 (Ind. Tax Ct.), *trans. denied*, 726 N.E.2d 312 (Ind. 1999) (mem.).

292. *Id.* at 553.

293. See *id.* at 554.

purchase the musical instruments at any point during either lease term.²⁹⁴ They could also return the instruments, with no further obligation, at any point after the trial rental period lease was satisfied.²⁹⁵ If a customer exercised the purchase option, Paige would apply a credit towards the purchase price in recognition of the rental payments previously made.²⁹⁶

The terms of the program provided that Paige would retain title to the instruments unless and until the lessee paid the amount necessary to obtain ownership.²⁹⁷ Despite this provision, Paige argued that its rent-to-own lease constituted conditional sale and that title retention was merely a "disguised security interest."²⁹⁸ Relying on the security interest exception,²⁹⁹ Paige argued that it was not the "owner" of the instruments leased under the program and, therefore, should not be held liable for the property taxes imposed on those instruments.³⁰⁰

The court rejected Paige's argument.³⁰¹ It looked to the law of security interests in determining that the program constituted a true lease and not a "disguised" security interest.³⁰² The court applied two tests it had established in *Kimco Leasing, Inc. v. State Board of Tax Commissioners*.³⁰³ The tests were derived from the statutory definition of "security interest" found at section 26-1-1-201(37) of the Indiana Code.³⁰⁴ It provides that a lease creates a security interest if (1) the lessee is obligated to perform for the full length of the lease without being able to voluntarily terminate it, or (2) if the lessor cannot reasonably expect to receive back anything of value at the end of the lease term.³⁰⁵

The court held that *Kimco's* first test was not met in this case because the terms of Paige's program did not obligate a lessee to perform for the full length of the lease.³⁰⁶ It also determined that even though Paige's customers could ultimately chose to purchase the leased instruments, the fact that they could terminate the lease after the trial rental period meant that Paige could reasonably expect to receive the instrument back at the end of the lease term.³⁰⁷ Therefore, the program did not meet the requirements of *Kimco's* second test.³⁰⁸

294. See *id.*

295. See *id.*

296. See *id.*

297. See *id.*

298. *Id.* at 555.

299. See IND. CODE § 6-1.1-1-9(e) (1998).

300. *W.H. Paige & Co.*, 711 N.E.2d at 555.

301. See *id.* at 560.

302. *Id.*

303. See *id.* at 557 (citing 656 N.E.2d 1208 (Ind. Tax Ct. 1995)).

304. *Id.* (citing IND. CODE § 26-1-1-201(37) (West 1995)).

305. See *id.* at 557.

306. See *id.*

307. See *id.* at 558.

308. See *id.*

In concluding that Paige was the owner of the musical instruments, the court acknowledged that some courts have found a security interest despite the fact that a lessee could terminate the lease at will.³⁰⁹ However, it explained that these cases generally involved a court's effort to protect an insolvent lessee from forfeiture, a justification not present in *Paige*.³¹⁰ The court also noted that under *Kimco*, it was required to base its determination on the situation existing at the inception of the lease, not at the end of the lease term.³¹¹ Under this analysis, Paige's customers were not bound to see the lease agreements through to the point where the instrument was purchased.³¹² Therefore, the court found that Paige owned the instruments for use in the production of income.³¹³ Accordingly, the instruments were subject to personal property tax and Paige was liable for that tax.³¹⁴

In *Dav-Con, Inc. v. State Board of Tax Commissioners*,³¹⁵ the taxpayer appealed the state board's valuation of steel the company possessed in connection with its operations as a steel processing and storage plant. An earlier tax court decision found Dav-Con liable for personal property tax on steel it held as "not-owned business property".³¹⁶ However, the issue of that property's value was remanded to the state board.³¹⁷ On remand, the court ordered the state board to base the assessment on the steel's "actual cost" rather than its "value" as previously reported by the four companies that owned the steel.³¹⁸ The state board contacted the four companies to determine the actual cost of the steel.³¹⁹ Only two responded and neither reported any difference between the cost and the value originally reported. To value the steel owned by the two companies that did not respond, the state board hearing officer relied on a response received from the original valuation inquiry³²⁰ and a storage invoice.³²¹

On appeal before the tax court, Dav-Con argued that the owners of the steel

309. See *id.* at 558-59 (citing *South Carolina Rentals, Inc. v. Arthur*, 187 B.R. 502 (D.S.C.1995); *In re Barnhill*, 189 B.R. 611 (Bankr. D.S.C. 1992); *In re Fogelsong*, 88 B.R. 194 (Bankr. C.D. Ill. 1988); *In re Puckett*, 60 B.R. 223 (Bankr. M.D. Tenn. 1986), *aff'd sub nom.* *Consumer Lease Network v. Puckett*, 838 F.2d 470 (6th Cir.1988); *cf. Skendzel v. Marshall*, 301 N.E.2d 641, 650 (Ind. 1973)).

310. See *id.* at 559.

311. See *id.* at 559-60.

312. See *id.* at 560.

313. See *id.*

314. See *id.* at 561.

315. 702 N.E.2d 1137 (Ind. Tax Ct. 1998), *review denied*, 714 N.E.2d 177 (Ind. 1999) (mem.).

316. *Dav-Con, Inc. v. State Bd. of Tax Comm'rs*, 644 N.E.2d 192 (Ind. Tax Ct. 1994).

317. See *id.* at 197.

318. The steel constituted inventory and, therefore, had to be assessed according to its cost. See *id.* at 197 (citing IND. ADMIN. CODE tit. 50, rs. 4.2-5.5 (1996)).

319. See *Dav-Con, Inc.*, 702 N.E.2d at 1140.

320. See *id.* at 1142.

321. See *id.* at 1143.

were primarily liable for the property tax.³²² The court rejected this argument citing section 6-1.1-2-4(a) of the Indiana Code which authorizes the state board to impose liability for property tax on the person in possession of the property but does not indicate any order of priority between the owner and the possessor.³²³ Dav-Con next challenged the accuracy of the valuation.³²⁴ It suggested that the state board's final assessment was flawed because the correspondence sent to the owners to obtain the true cost of the steel did not adequately define "cost".³²⁵ The court held that the definition of "cost" under the relevant regulations was essentially the same as the common usage definition.³²⁶ Therefore, the correspondence was a "reasonable means"³²⁷ of arriving at a value for purposes of the assessment, despite the state board's failure to specifically define "cost."³²⁸ The court noted Dav-Con's failure to provide any evidence that the valuations were flawed and upheld the state board's final determination.³²⁹

In *PPG Industries, Inc. v. State Board of Tax Commissioners*,³³⁰ the tax court held that tangible personal property owned by a non-resident taxpayer temporarily stored pending shipping is not assessed at that location if the taxpayer has a principle office elsewhere in the state.³³¹ The taxpayer in that case, PPG Industries, Inc. ("PPG"), stored finished glass products at both its principle offices in Scott Township and a warehouse located in Center Township.³³² However, PPG reported the total cost of the glass on property tax returns filed in Scott Township and filed no return in Center Township.³³³

During review of a decision regarding an unrelated deficiency, the state board determined that PPG was not entitled to an interstate commerce exemption³³⁴ for the finished glass stored at the warehouse.³³⁵ It based its

322. See *id.* at 1140.

323. See *id.* (citing IND. CODE § 6-1.1-2-4(a) which imposes property liability on the person possessing the property on the assessment date unless that person can establish that the property is being assessed and taxed in the owner's name or that the owner is liable for the taxes under contract); see also *Dav-Con, Inc.*, 644 N.E.2d at 194-95.

324. See *Dav-Con, Inc.*, 702 N.E.2d at 1141.

325. *Id.*

326. *Id.*

327. *Id.* In the absence of information provided by the party to be assessed, the state board has authority to determine the assessed value of property by any method that is reasonable in light of the facts and circumstances and yields "substantial evidence" of the assessed value of the property. *Dav-Con, Inc.*, 644 N.E.2d at 196.

328. *Dav-Con, Inc.*, 702 N.E.2d at 1141.

329. See *id.* at 1143.

330. 706 N.E.2d 611 (Ind. Tax Ct. 1999).

331. See *id.* at 616.

332. See *id.* at 612.

333. See *id.*

334. See *id.* Section 6-1.1-10-29 of the Indiana Code exempts personal property owned by a manufacturer or processor that is stored in Indiana, remains in its original package, and is designated for shipment, without further processing, to an out-of-state destination. See IND. CODE

decision on PPG's failure to file a personal property tax return in Center Township where the warehouse was located.³³⁶ According to the state board, by not filing the return PPG failed to comply with the statutory procedures for obtaining the exemption and effectively waived its right to that exemption.³³⁷

The tax court rejected the state board's position and held that the issue of whether PPG was required to file a personal property tax return was governed by statute.³³⁸ In Indiana, personal property owned by non-residents is assessed where the owner's principle office within the state is located unless the property is: (1) regularly used or permanently located where it is situated; or (2) owned by a nonresident who does not have a principle office within the state.³³⁹ The court held that the finished glass temporarily stored in the Center Township warehouse was neither "regularly used" nor "permanently located" there for purposes of the statute.³⁴⁰ Therefore, the property was correctly reported and assessed in Scott Township and PPG was entitled to the exemption.³⁴¹ The court cautioned that its holding did not apply to merchandise awaiting sale as the finished glass in this case was already sold and in transit on the assessment date.³⁴²

E. Indiana Procedure for Tax Administration

In *State Board of Tax Commissioners v. Mixmill Manufacturing Co.*,³⁴³ the Indiana Supreme Court considered the limits of the tax court's jurisdiction over direct appeals against the state board when the County Board of Review fails to act on a Petition for Review of Assessment.³⁴⁴ The case arose when Mixmill Manufacturing Company ("Mixmill") filed for a review of assessment with the Wells County Auditor.³⁴⁵ After five years, Mixmill had received no response from the county board of review or the state board regarding its petition.³⁴⁶ Mixmill then filed an original appeal with the tax court.³⁴⁷ At the appeal, the

§ 6-1.1-10-29 (1998); see also *PPG Indus., Inc.*, 706 N.E.2d at 612 n.1.

335. See *PPG Indus., Inc.*, 706 N.E.2d at 612.

336. See *id.* at 613.

337. See *id.*; see also IND. CODE § 6-1.1-11-1 (Waiver of exemption).

338. See *PPG Indus., Inc.*, 706 N.E.2d at 613 (citing IND. CODE § 6-1.1-3-1(b)-(c) (Supp. 1998)).

339. See *id.* (citing IND. CODE § 6-1.1-3-1(b)-(c)).

340. *Id.* at 614.

341. See *id.*

342. See *id.* at 616.

343. 702 N.E.2d 701 (Ind. 1998).

344. See also *State Board of Tax Comm'rs v. L.H. Carbide Corp.*, 702 N.E.2d 706 (Ind. 1998) (arriving at the same decision regarding the tax court's jurisdiction but dealt with Petitions for Correction of Errors as opposed to the Petition for Review of Assessment involved in this case).

345. See *Mixmill Mfg. Co.*, 702 N.E.2d at 702.

346. See *id.*

347. See *id.*

state board argued that the tax court lacked jurisdiction and moved to dismiss.³⁴⁸ The motion was denied and the Indiana Supreme Court, under a petition for interlocutory appeal, accepted the case.³⁴⁹

The supreme court held that the tax court did not have jurisdiction over the original appeal because it was not preceded by a final determination by the state board.³⁵⁰ The court referred to the enabling statute which provides jurisdiction to the tax court only over cases that arise under Indiana's tax laws and have been first subjected to review by the applicable administrative agency.³⁵¹ According to the statutory provisions regarding assessment reviews, Mixmill was required to wait for a determination from the county board, then appeal that determination to the state board, and subsequently file an original appeal with the tax court.³⁵²

The supreme court acknowledged that the provisions did not provide taxpayers with an alternative avenue when the county board simply fails to issue a determination.³⁵³ However, it pointed out that section 33-3-5-11(a) of the Indiana Code specifically denies tax court jurisdiction where the taxpayer fails to comply with any statutory requirements for the initiation of an appeal.³⁵⁴ The court did suggest that a sluggish administrative agency could be prodded into action with a writ of mandamus, but explained that such a suit must be brought in a court of general jurisdiction because it would not meet the final determination requirement of the tax court's jurisdiction.³⁵⁵

In *Matonovich v. State Board of Tax Commissioners*,³⁵⁶ the tax court interpreted the statutory limits on the state board's authority over property reassessments.³⁵⁷ The case arose when a Division of Tax Review³⁵⁸ study revealed a need for a reassessment of all real property in Lake County due to a problem with the uniformity of assessments within classes of property.³⁵⁹ As a result of that study, the state board ordered a reassessment of all real property in Lake County and stated that it would hire a contractor to conduct and oversee the reassessment.³⁶⁰ A group of Lake County township assessors filed an original tax appeal arguing that the state board had no authority to conduct the reassessment or employ contractors to do so on its behalf.³⁶¹

The tax court enjoined the state board from hiring the contractors to conduct

348. *See id.*

349. *See id.*

350. *See id.* at 706.

351. *See id.* at 702; *see also* IND. CODE § 33-3-5-2(a) (1998).

352. *See Mixmill Mfg. Co.*, 702 N.E.2d at 704.

353. *See id.*

354. *See id.* (citing IND. CODE § 33-3-5-11(a)).

355. *See id.* at 704; *see also* IND. CODE § 33-3-5-2(a).

356. 705 N.E.2d 1093 (Ind. Tax Ct.), *review denied*, 726 N.E.2d 298 (Ind. 1999) (mem.).

357. *See id.*

358. A division of the state tax board. *See* IND. CODE § 6-1.1-33-1.

359. *See Matonovich*, 705 N.E.2d at 1095.

360. *See id.*

361. *See id.* at 1096.

the reassessment.³⁶² The state board's statutory authority to order and supervise a countywide reassessment is clear and was not disputed in this case.³⁶³ The issue considered was whether the state board's authority to order and supervise the reassessment necessarily implied the authority to conduct the reassessment.³⁶⁴ The court determined that the state board does not have the authority to conduct a countywide reassessment and therefore cannot hire contractors to do so on its behalf.³⁶⁵ The court's decision focused on the "plain language" of section 6-1.1-4-9 of the Indiana Code which refers to the board ordering a reassessment but not conducting a reassessment.³⁶⁶ It held that this wording implies that the state board is not the body charged with actually conducting the reassessment.³⁶⁷ The court supported its interpretation by pointing to separate statutory provisions that expressly charge Township assessors with conducting assessments³⁶⁸ and limit the amount that assessors may spend to the cost of the reassessment estimated by the state board.³⁶⁹ It also relied on the fact that, in general, assessments are done locally and the state board does not determine the assessed value of property, except in appeals.³⁷⁰

In *Word of His Grace Fellowship, Inc. v. State Board of Tax Commissioners*,³⁷¹ the court reversed the state board's denial of a property tax exemption when it failed to provide valid support for its position prior to the original tax appeal.³⁷² Word of His Grace Fellowship, Inc. ("Word"), is a not-for-profit corporation established exclusively for religious, charitable, educational, and ecclesiastical purposes. This case arose when Word was denied a property tax exemption³⁷³ for property it purchased under a land sale contract for use as a church.³⁷⁴ In its final determination, the state board based its denial on the fact that the property was not owned, occupied, and used by the same entity.³⁷⁵ However, at the original tax appeal, the state board was forced to concede that a tax court decision handed down five months before that final

362. See *id.* at 1099.

363. See *id.* at 1096; IND. CODE §§ 6-1.1-4-9, 6-1.1-30-10 (1998).

364. See *Matonovich*, 705 N.E.2d at 1097.

365. See *id.*

366. *Id.*

367. See *id.*

368. See *id.* (citing IND. CODE § 36-6-5-3).

369. See *id.* (citing IND. CODE § 6-1.1-4-29(b)).

370. See *id.* at 1098.

371. 711 N.E.2d 875 (Ind. Tax Ct. 1999).

372. See *id.* at 878.

373. Section 6-1.1-10-16(a), (c) of the Indiana Code provides a property tax exemption for a building and a tract of land if it is owned, occupied, and used by a person for educational, literary, scientific, religious, or charitable purposes. See IND. CODE § 6-1.1-10-16(a), (c) (Supp. 1998).

374. See *Word of His Grace Fellowship, Inc.*, 711 N.E.2d at 876.

375. See *id.* at 877. As vendee in the contract, Word possessed the property but held only equitable title.

determination held that no such requirement existed.³⁷⁶

In an alternative argument, the state board suggested that because Word was not the holder of legal title, it was not the proper party to apply for the property tax exemption.³⁷⁷ The court agreed that the owner of the property must apply for the exemption and that an owner was defined as the holder of legal title.³⁷⁸ However, because the state board did not raise that issue until the original tax appeal, the court refused to affirm the final determination.³⁷⁹ The court based its decision on the well-settled rule that the state board may not support a final determination with reasons that were not previously ruled upon.³⁸⁰ Therefore, even though Word was not the proper party to apply for the exemption, the court was forced to decide the case based solely on the question of whether the property was owned, occupied, and used for religious purposes.³⁸¹ Under that analysis, the court held that Word was entitled to the exemption.³⁸²

In *City Securities Corp. v. Department of State Revenue*,³⁸³ the tax court ruled that no statutory remedy exists for taxpayers who do not receive a Letter of Findings ("LOF") from the IDSR within the prescribed deadline; however, the court noted that taxpayers in that situation could appeal to the tax court or petition for mandamus to compel the IDSR to act.³⁸⁴

City Securities Corp. ("City")³⁸⁵ appealed to the tax court after the IDSR failed to respond to City's claim for a refund.³⁸⁶ The IDSR had assessed additional tax liability against City for income it received from the purchase and resale of certain tax-exempt municipal bonds.³⁸⁷ City filed a written protest and received a hearing.³⁸⁸ However, the IDSR failed to issue its LOF within the sixty day prescribed deadline.³⁸⁹ After 105 days, City received the LOF, paid the assessment, and filed a claim for refund. City appealed to the tax court after waiting six months without receiving a response to its claim.³⁹⁰

In its appeal, City argued that the IDSR's failure to meet the sixty-day

376. See *id.* (citing *Sangrilea Boys Fund, Inc. v. State Board of Tax Commissioners*, 686 N.E.2d 954 (Ind. Tax Ct. 1997)).

377. See *id.* at 878 (citing IND. CODE § 6-1.1-11-1).

378. See *id.*

379. See *id.* at 878.

380. See *id.* at 878.

381. See *id.* at 879.

382. See *id.* at 879.

383. 704 N.E.2d 1122 (Ind. Tax Ct. 1998).

384. See *id.* at 1126.

385. City is a corporation engaged in the business of buying and selling securities for profit. See *id.* at 1124.

386. See *id.*

387. See *id.*

388. See *id.*

389. See *id.*

390. See *id.*

deadline voided the assessment.³⁹¹ Alternatively, it argued that the sale of the municipal bonds was exempted from gross income tax both by statute and by the IDSR which historically treated them as exempt.³⁹² The court rejected City's statutory argument.³⁹³ It explained that the enabling statutes that City relied on were merely the legislature's attempt to create a tax exempt security to allow certain entities, such as schools, to raise funds with less expense.³⁹⁴ However, the scope of that exemption is limited by the General Exemption Statute and extends only to income generated by the bonds themselves and not to income generated through the sales and marketing strategies of dealers like City.³⁹⁵

Despite the statutory support for the IDSR's position, the court held in favor of City because the IDSR had historically allowed the exemption and was statutorily required³⁹⁶ to promulgate new regulations if it changed that policy.³⁹⁷ The court acknowledged that the IDSR had issued new regulations suggesting the policy shift.³⁹⁸ However, because it continued to allow City the exemption after the regulations were issued, it could not now impose the additional liability.³⁹⁹

In *Heart City Chrysler v. State Board of Tax Commissioners*,⁴⁰⁰ the tax court reversed a final determination of the state board that was based on the state board's sua sponte assessment. The case arose after Heart City Chrysler ("Heart City") petitioned for an assessment adjustment to account for physical depreciation⁴⁰¹ of a sales office used in operating its car sales business.⁴⁰² The state board agreed with Heart City and granted the adjustment.⁴⁰³ However, it then made a sua sponte assessment of a separate building owned by Heart City that led to an unfavorable depreciation adjustment⁴⁰⁴ and a higher property tax liability.⁴⁰⁵

Heart City appealed to the tax court arguing that its due process rights were

391. See *id.* at 1126.

392. See *id.* at 1127.

393. See *id.* at 1128.

394. See *id.*

395. See *id.*

396. While this statutory requirement was in effect at all time relevant to City's appeal, it has since been repealed. See IND. CODE ANN. § 6-2.1-8-3 (West 1989) (repealed 1997).

397. See *City Securities Corp.*, 704 N.E.2d at 1128; IND. CODE § 6-2.1-8-3.

398. See *City Securities Corp.*, 704 N.E.2d at 1129; IND. ADMIN. CODE tit. 45, r. 1-1-35, r. 1-1-127 (1996).

399. See *City Securities Corp.*, 704 N.E.2d at 1129.

400. 714 N.E.2d 329 (Ind. Tax Ct. 1999).

401. Physical depreciation of an improvement is recognized by applying a depreciation factor to the assessed value of the subject improvement. The factor is expressed as a percentage and is based on the improvement's age, condition, and structure type. See *supra* Part II.C.

402. See *Heart City Chrysler*, 714 N.E.2d at 331.

403. See *id.*

404. The state board decreased the physical depreciation factor from 45% to 35%. See *id.* at 332 n.8.

405. See *id.* at 332.

violated because it did not have the opportunity to rebut the findings provided in the state board's final determination regarding the sua sponte assessment.⁴⁰⁶ The court did not reach the due process issue because it found another issue dispositive.⁴⁰⁷ It explained that while the state board could conduct a sua sponte assessment, it was nevertheless required to comply with certain statutory requirements in issuing its final determination.⁴⁰⁸

The court cited section 6-1.1-30-12 of the Indiana Code,⁴⁰⁹ which provides that a hearing officer shall submit a written report of his findings to the state board.⁴¹⁰ That section further provides that the state board shall base its final decision on the hearing officer's report, any additional evidence taken by the board, and any records it considers relevant.⁴¹¹ In reversing the assessment, the court explained that the state board failed to comply with these requirements.⁴¹² The court held that the hearing record did not include information indicating the basis for the state board's findings regarding the reduction of the depreciation factor.⁴¹³ Furthermore, the court noted that the hearing officer had not submitted a written report to the state board recommending the adjustment.⁴¹⁴

In *Hoogenboom-Nofziger v. State Board of Tax Commissioners*,⁴¹⁵ the tax court once again upheld an otherwise deficient final determination of the state board simply because the taxpayer failed to properly present its case at the administrative level.⁴¹⁶ The court received the appeal after *Hoogenboom-Nofziger* ("HN") unsuccessfully challenged the assessment of its real estate sales office⁴¹⁷ at the County Board of Review ("BOR") and state board levels.⁴¹⁸ HN first argued that reversal of the state board's final determination was required because the board failed to adhere to specific statutory requirements in administering HN's hearing.⁴¹⁹

HN cited sections 6-1.1-30-11 and 4-22-5-1 of the Indiana Code, which allow the state board to appoint a hearing officer to conduct a hearing on the Board's

406. See *id.* at 331.

407. See *id.*

408. See *id.*

409. See IND. CODE ANN. § 6-1.1-30-12 (West 1989) (amended 1997, effective Jan. 1, 1999).

410. See *Heart City Chrysler*, 714 N.E.2d at 331 (citing IND. CODE § 6-1.1-30-12).

411. See *id.*

412. See *id.* at 332.

413. See *id.*

414. See *id.*

415. 715 N.E.2d 1018 (Ind. Tax Ct. 1999).

416. See also *Whitley Prods., Inc. v. State Bd. of Tax Comm'rs*, 704 N.E.2d 1113, 1116-21 (Ind. Tax Ct. 1998), *review denied*, 714 N.E.2d 174 (Ind. 1999) (mem.).

417. According to the taxpayer, the office should have been assessed under the Residential Pricing Schedule because the building was a converted dwelling. See *Hoogenboom-Nofziger*, 715 N.E.2d at 1021; see also IND. ADMIN. CODE tit. 50 r. 2.1-4-4 (1992) (codified in present form at IND. ADMIN. CODE r. 2.2-11-5.1(a) (1996)).

418. See *Hoogenboom-Nofziger*, 715 N.E.2d at 1021.

419. See *id.*

behalf if that appointment is made in writing and that writing advises the officer of his duties.⁴²⁰ At trial before the court, HN established that the hearing officer in this case was given no written instructions and there was no evidence to indicate that the appointment had been made in writing.⁴²¹ The court agreed that the officer was not properly appointed.⁴²² However, it refused to reverse the state board's final determination because HN had not raised the appointment issue before the Board directly.⁴²³ The court cited section 33-3-5-14 of the Indiana Code,⁴²⁴ which allows the court to consider only evidence and issues raised at the administrative level.⁴²⁵ Based on that restriction, the court held that the taxpayer had waived the issue of the appointment's validity by remaining silent and participating in the hearing before the state board.⁴²⁶

HN next argued that reversal was warranted because the state board failed to adequately account for differences between a real estate office ("subject improvement") and the model used in its assessment.⁴²⁷ Specifically, HN argued that the subject improvement should have received a lower grade⁴²⁸ than that assigned by the Board.⁴²⁹ The court reviewed the final determination and held that the state board failed to support its conclusion with substantial evidence.⁴³⁰ It acknowledged that such a failure would normally require reversal of the assessment.⁴³¹ However, in this case, it held that the state board's evidentiary burden was not "triggered" because of HN's failure to present evidence at the administrative level.⁴³²

At the state board hearing, HN⁴³³ offered only conclusory statements and photographs with no accompanying explanations in support of its contention that

420. *See id.* (citing IND. CODE ANN. §§ 6-1.1-30-11; 4-22-5-1 (West 1989) (amended eff. Jan. 1, 1999)).

421. *See id.*

422. *See id.* at 1022.

423. *See id.*

424. *See* IND. CODE § 33-3-5-14 (1998).

425. *See Hoogenboom-Nofziger*, 715 N.E.2d at 1022 (citing IND. CODE § 33-3-5-14).

426. *See id.*

427. *See id.*

428. "Grades" are assigned to recognize the quality of materials and workmanship used in constructing an improvement. IND. ADMIN. CODE tit. 50, r. 2.1-4-3(1992) (codified in present form at IND. ADMIN. CODE tit. 50, r. 2.2-10-3 (1996)). In addition, grades can be adjusted to recognize situations where an improvement deviates from the model used to assess that improvement. *See Whitley Prods., Inc. v. State Bd. of Tax Comm'rs*, 704 N.E.2d 1113, 1116 (Ind. Tax Ct. 1998), *review denied*, 714 N.E.2d 174 (Ind. 1999) (mem.).

429. *See Hoogenboom-Nofziger*, 715 N.E.2d at 1023.

430. *See id.*

431. *See id.* at 1024.

432. *Id.* at 1024-25.

433. HN was represented at the administrative level by Mr. Drew Miller, a property tax consultant. *See id.* at 1023. However, in the interest of simplicity, this Article will not distinguish between the actions of the taxpayer and its representative.

the grading was in error.⁴³⁴ The court interpreted this “de minimus factual showing” as an attempt by HN to shift the responsibility for making its case to the hearing officer.⁴³⁵ It cited its earlier holding in *Whitley Prods., Inc. v. State Board of Tax Commissioners*,⁴³⁶ where it similarly upheld a deficient final determination because of a taxpayer’s failure to meet its evidentiary burden.⁴³⁷ In defense of the holding, the court rhetorically asked: “If a taxpayer cares so little about its case that it does not make a strong factual case at the administrative level, why should the State Board care any more than the taxpayer?”⁴³⁸

F. Indiana Sales & Use Taxes

In *Tri-States Double Cola Bottling Co. v. Department of State Revenue*,⁴³⁹ a soft drink bottling company appealed the IDSR assessment of use tax on purchases made in connection with its business operations.⁴⁴⁰ Specifically, the court considered whether Tri-States Double Cola Bottling Co. (“Tri-States”), owed use tax for (1) uniforms purchased for employees, (2) glass-front coolers provided to retailers who sell Tri-State’s products, and (3) computer equipment purchased from an out-of-state retailer.⁴⁴¹

In finding in favor of the IDSR’s assessment of use tax liability for the uniforms, the court rejected Tri-State’s argument that an exemption applied.⁴⁴² An exemption from sales and use tax is available for “[s]afety clothing . . . [that] is required to . . . prevent contamination of the product during production.”⁴⁴³ The court found that the key issue was whether Tri-States established that the uniforms were required to prevent contamination.⁴⁴⁴ The court held that simply showing that the uniforms reduce the possibility of contamination was not enough to meet that burden.⁴⁴⁵ In finding that Tri-States did not qualify for the

434. At trial before the tax court, HN gave responses to the state board’s interrogatories which would have conclusively demonstrated errors in the assessment. However, because the responses contained factual assertions not made at the administrative level, the tax court did not consider them in its decision.

435. *Hoogenboom-Nofziger*, 715 N.E.2d at 1024-25.

436. 704 N.E.2d 1113, 1116-21 (Ind. Tax Ct. 1998), *review denied*, 714 N.E.2d 174 (Ind. 1999) (mem.)

437. *See Hoogenboom-Nofziger*, 715 N.E.2d at 1023 (citing *Whitley*, 704 N.E.2d at 1116-21).

438. *Id.*

439. 706 N.E.2d 282 (Ind. Tax Ct. 1999).

440. *See id.* Indiana imposes a use tax on the use, storage or consumption of tangible personal property in Indiana; *see* IND. CODE § 6-2.5-3-2 (1998), as a complement to the sales tax imposed on all retail transactions in Indiana. *Id.* § 6-2.5-2-1.

441. *See Tri-States Double Cola Bottling Co.*, 706 N.E.2d at 282.

442. *See id.* at 284.

443. *Id.* (citing IND. ADMIN. CODE tit. 45, r. 2.2-5-8(c)(2)(F) (1996)).

444. *See id.*

445. *See id.*

exemption, the court focused on the fact that the employees were allowed to wear the uniforms to and from work and during breaks.⁴⁴⁶

The court next considered whether the glass-front coolers provided to retailers were leased for the purpose of the use tax lease exemption.⁴⁴⁷ It explained that the lease exemption exists to avoid the tax pyramiding⁴⁴⁸ that would otherwise occur if a sales/use tax was imposed on both the purchase and the subsequent leasing of an item.⁴⁴⁹ In holding that Tri-States was not entitled to such an exemption, the court determined that the agreement with the retailers did not constitute a lease under the ordinary understanding of the term.⁴⁵⁰ Therefore, that transaction was not subject to use tax.⁴⁵¹ Because the transaction was not taxable as a lease, no tax pyramiding could occur and, therefore, the exemption would not apply.⁴⁵²

Finally, the court held that Tri-States was liable for use tax on the computer equipment purchase from the Kentucky retailer even though the retailer allegedly collected the tax.⁴⁵³ The court explained that a taxpayer is only relieved of its liability for paying use tax to the state if the retail merchant is engaged in business in Indiana or if the retail merchant has permission from the IDSR to collect the tax.⁴⁵⁴ In this case, Tri-States did neither and, therefore, remained liable for the use tax.⁴⁵⁵ The court noted, however, that Tri-States could seek to recover from the retailer for failure to remit the tax.⁴⁵⁶

In *Mynsberge v. Department of State Revenue*,⁴⁵⁷ the tax court held that the original purchase of electricity by a landlord resulted in sales tax liability to that landlord even though he "resold" it to his tenant, the ultimate consumer.⁴⁵⁸ The original tax appeal was brought by "Richard C. Mynsberge d/b/a RCM Rentals"

446. See *id.*

447. The Indiana Code exempts goods acquired for resale, rental, or leasing, from sales and use tax. See IND. CODE ANN. § 6-2.5-5-8 (West 1989) (amended 1990).

448. Tax Pyramiding would occur here where a sales/use tax was imposed on the purchase/use of the cooler by Tri-States followed by additional sales tax liability under section 6-2.5-4-10(a) of the Indiana Code imposed on the leasing of tangible personal property to the retailers.

449. See *Tri-States Double Cola Bottling Co.*, 706 N.E.2d at 285 n.5.

450. See *id.* at 286.

451. See *id.*

452. See *id.*

453. See *id.*

454. See *id.* at 287 (citing IND. CODE ANN. § 6-2.5-3-6(b) (West 1989) (amended 1989, 1994 & 1997)).

455. See *id.*

456. See *id.*

457. 716 N.E.2d 629 (Ind. Tax Ct. 1999).

458. *Id.* Indiana imposes an excise tax (gross retail or sales tax) on retail transactions made in Indiana. See IND. CODE § 6-2.5-2-1(a) (1998). However, an exemption is provided for sales of tangible personal property acquired in the ordinary course of business for "resale, rental, or leasing." *Id.* § 6-2.5-5-8.

("Mynsberge") after the IDSR denied his claim for a refund for sales taxes paid on purchases of electricity from a utility company.⁴⁵⁹ In his appeal to the tax court, Mynsberge argued that his purchases of electricity from the utility company were not subject to sales tax because they were not retail transactions.⁴⁶⁰ Alternatively, Mynsberge suggested that his electricity purchases from the utility company were exempt from sales tax because the electricity constituted tangible personal property that he later resold to his tenants in the ordinary course of business.⁴⁶¹

As part of his business, Mynsberge leased buildings and equipment to his tenant who operated a cabinet manufacturing business.⁴⁶² In addition to the monthly lease payment, the tenant made a payment to Mynsberge for electricity used in its manufacturing business.⁴⁶³ Mynsberge argued that his original purchase was not a retail transaction because statutory language describes the selling of electrical energy as a retail transaction when it is made "to a person for commercial or domestic consumption."⁴⁶⁴ According to Mynsberge, his purchase from the utility company was not a retail transaction because he did not consume the electricity; rather he resold it to his tenant.⁴⁶⁵

The court rejected this argument and held that the statute did not require that the purchaser actually consume the electricity.⁴⁶⁶ Instead, the court read the plain language of the statute to require only a sale to a person and that the electricity be used for either commercial or domestic consumption.⁴⁶⁷ Under this interpretation, Mynsberge's purchase was a retail transaction.⁴⁶⁸

The court decided that, despite his arguments, Mynsberge was not entitled to a sales tax exemption under section 6-2.5-5-8 of the Indiana Code.⁴⁶⁹ That section provides a sales tax exemption for sales of tangible personal property acquired in the ordinary course of business for resale, rental or leasing.⁴⁷⁰ The court held that electricity is not tangible personal property under the Indiana Code and therefore the exemption did not apply.⁴⁷¹ It based this conclusion on the language of sections 6-2.5-4-5⁴⁷² and 6-2.5-5-5.1 of the Indiana Code,⁴⁷³

459. *Mynsberge*, 716 N.E.2d at 631.

460. *See id.* at 632.

461. *See id.* at 631; *see also* IND. CODE § 6-2.5-5-8 (1998).

462. *See Mynsberge*, 716 N.E.2d at 631.

463. *See id.*

464. *Id.* at 632 (citing IND. CODE ANN. § 6-2.5-4-5 (West 1989) (amended 1993)).

465. *See id.*

466. *See id.* at 633.

467. *See id.*; *see also* IND. CODE § 6-2.5-4-5.

468. *See Mynsberge*, 716 N.E.2d at 633.

469. *See id.* at 636.

470. *See id.*; *see also* IND. CODE § 6-2.5-5-8 (Supp.1999)).

471. *See Mynsberge*, 716 N.E.2d at 636.

472. The Indiana Code states that the sale of electricity by public utilities and power subsidiaries constitutes a retail transaction. *See* IND. CODE § 6-2.5-4-5.

473. Section 6-2.5-5-5.1 of the Indiana Code states that, for purposes of that section,

which treat electricity as tangible personal property for purposes of those sections.⁴⁷⁴

According to the court, if the legislature had intended electricity to be deemed tangible personal property under section 6-2.5-1-2(a) of the Indiana Code, this additional language would be unnecessary.⁴⁷⁵ The court found support in *Department of State Revenue v. Cable Brazil, Inc.*,⁴⁷⁶ where the Indiana Court of Appeals held that cable television signals were not tangible personal property for sales tax purposes.⁴⁷⁷ The tax court determined that the similarities between cable television and electricity supported its holding in *Mynsberge*.⁴⁷⁸

G. Indiana Motor Carrier Fuel Taxes

In *Bulkmatic Transport Co. v. Department of State Revenue* ("Bulkmatic IIP"),⁴⁷⁹ the tax court revisited the "in Indiana" limitation on the motor carrier fuel use tax exemption for fuel consumed in powering machinery attached to a motor vehicle.⁴⁸⁰ In *Bulkmatic Transport Co. v. Department of State Revenue* ("Bulkmatic IP"),⁴⁸¹ the court held that this limitation violated the Commerce Clause because it effectively imposed a different tax for the use of Indiana roads depending on whether a motor carrier operated attached machinery within Indiana or in another state.⁴⁸² One year later, after hearing the arguments in *Bulkmatic III*, the court reaffirmed that position.⁴⁸³ To better understand the court's holdings in these cases, it is necessary to first review the tax to which this exemption applies.⁴⁸⁴

Indiana taxes motor carriers⁴⁸⁵ for the benefit of using its highways based on

electrical energy is tangible personal property and exempt from sales tax if "consumed in the direct production as a material to be consumed in the direct production of other tangible personal property in the person's business. . . ." IND. CODE § 6-2.5-5-5.1.

474. See *Mynsberge*, 716 N.E.2d at 637.

475. See *id.*

476. 380 N.E.2d 555 (1978).

477. See *id.* at 561. Indiana courts have never determined whether electricity constitutes tangible personal property for sales tax purposes. The court of appeals raised the issue in *State v. Indiana-Kentucky Electric Corp.*, 438 N.E.2d 782, 785 (Ind. Ct. App. 1982), but did not decide it. See *Mynsberge*, 716 N.E.2d at 637.

478. See *Mynsberge*, 716 N.E.2d at 637.

479. 715 N.E.2d 26 (Ind. Tax Ct. 1999).

480. In 1999, the general assembly changed the motor carrier fuel use tax exemption to a credit and eliminated the "in Indiana" limitation.

481. 691 N.E.2d 1371 (Ind. Tax Ct. 1998).

482. See *id.* at 1379.

483. See *Bulkmatic III*, 715 N.E.2d at 26.

484. The "tax" is actually comprised of two separate taxes. The motor vehicle fuel tax and the motor carrier surcharge tax. However, for purposes of this discussion they will be referred to as one tax. See IND. CODE § 6-6-2.5-28(a) (1998).

485. See *id.* § 6-6-4.1-1(a) (defining carrier).

the number of gallons of fuel the carrier consumes on those highways during a tax year.⁴⁸⁶ At the time of this case, the carrier calculated this figure by multiplying its entire fuel consumption by the number of miles traveled on Indiana highways and then dividing this amount by the total number of miles traveled.⁴⁸⁷ The resulting total, representing the fuel consumed on Indiana highways, was multiplied by the applicable tax rate⁴⁸⁸ to arrive at the fuel tax liability.⁴⁸⁹

Unfortunately, the formula did not account for those vehicles with a single fuel tank supplying both the vehicle's engine and attached "power take-off" ("PTO") equipment.⁴⁹⁰ Consequently, the motor carrier's tax liability reflected the fuel consumed operating the attached equipment.⁴⁹¹ To avoid this result, the General Assembly exempted the fuel used in operating the PTO equipment from the motor carrier fuel tax.⁴⁹² However, this exemption⁴⁹³ was limited to the use of PTO equipment in Indiana.⁴⁹⁴ Therefore, the fuel consumed by a carrier's PTO equipment in all fifty states was included in figuring the tax liability, but only that fuel used in operating the PTO equipment in Indiana was exempted.⁴⁹⁵

The IDSR argued that Indiana could constitutionally exempt any fuel apportioned to it because those gallons were subject to the State's unquestioned power to tax.⁴⁹⁶ It further argued that fuel that was not apportioned to Indiana was not subject to the motor carrier fuel tax and, therefore, need not be exempted.⁴⁹⁷ In rejecting these arguments, the court held that the mere fact that Indiana was refunding tax that it could have kept did not make the "in-Indiana" limitation constitutional.⁴⁹⁸ It further explained that while the fuel not apportioned to Indiana may not have been subject to Indiana tax, the limitation nevertheless distorted the apportionable base⁴⁹⁹ by including all fuel used in operating the PTO but exempting only the Indiana PTO fuel.⁵⁰⁰ According to the

486. See *id.* §§ 6-6-4.1-4(a), -4.5(a).

487. See *Bulkmatic III*, 715 N.E.2d at 28.

488. The rate applicable in *Bulkmatic III* was \$0.27 per gallon. See IND. CODE § 6-6-2.5-28(a).

489. See *Bulkmatic III*, 715 N.E.2d at 28.

490. *Id.* For example, some vehicles have attached equipment used in offloading cargo.

491. See *id.*

492. See *id.* (citing IND. CODE ANN. §§ 6-6-4.1-4(d), -4.5(d) (West Supp.1998)).

493. A fixed percentage of the fuel consumed is exempted. The applicable percentage depends on the type of vehicle and the type of PTO equipment on the vehicle. The carrier was required to pay the tax first and then file a refund claim. See *id.* at 28 n.7.

494. See *id.*

495. See *id.*

496. See *id.*

497. See *id.*

498. *Id.* (citing *Westinghouse Electric Corp.*, 466 U.S. 388, 398 (1984)).

499. The total fuel consumption amount against which the ratio of Indiana mileage to total mileage is applied.

500. See *id.* at 33.

court, this distortion caused motor carriers to be taxed differently based solely on where they chose to use their PTO equipment.⁵⁰¹

H. Indiana Inheritance Taxes

In *Department of State Revenue v. Estate of Hardy*,⁵⁰² the tax court determined the inheritance tax liability when a surviving joint tenant exercises survivorship rights over property for which he paid 100% of the purchase price.⁵⁰³ The case involved a brother and sister, Dale and Avis Hardy, who owned real property jointly with rights of survivorship.⁵⁰⁴ The brother paid 100% of the purchase price of the property, and, when his sister died, her interest passed to him.⁵⁰⁵ The IDSR alleged that the brother owed inheritance tax on the exercise of his survivorship rights to the property.⁵⁰⁶

The estate argued that Dale's exercise of the survivorship rights were not subject to inheritance tax because the subject property belonged to Dale who contributed 100% of the purchase price.⁵⁰⁷ It based its argument on section 6-4.1-2-5 of the Indiana Code, which provides that the value of property transferred by the exercise of the right of survivorship equals the value of the property minus the value of the portion of the property that "belonged to" the survivor.⁵⁰⁸

The IDSR argued that, for purposes of section 6-4.1-2-5 of the Indiana Code, property "belongs to" its owner regardless of whether the owner contributed to the purchase of the property.⁵⁰⁹ Therefore, because the property was held in joint tenancy, fifty percent belonged to the decedent and fifty percent belonged to Dale prior to the decedent's death.⁵¹⁰ Based on this interpretation of the statute, Dale was liable for inheritance tax for the exercise of his survivorship rights over the fifty percent of the property owned by the decedent at death.⁵¹¹

The court rejected this argument citing title 45, rule 4.1-2-9(a) of the Indiana Administrative Code which provides an inheritance tax exemption to the extent of the surviving joint owner's contribution to the purchase of the jointly held property.⁵¹² According to the court, this regulation was adopted by the IDSR to avoid the problems that would result if the value of such a transfer were based

501. See *id.*

502. See 703 N.E.2d 705 (Ind. Tax Ct. 1998).

503. Indiana Inheritance tax is imposed on the transfer of property at death, not on the property itself. See IND. CODE § 6-4.1-2-1 (1998). One transfer subject to Indiana inheritance tax is the exercise of survivorship rights in cases of jointly held property. See *id.* § 6-4.1-2-4, -5.

504. See *Estate of Hardy*, 703 N.E.2d at 706.

505. See *id.*

506. See *id.*

507. See *id.* at 707.

508. IND. CODE § 6-4.1-2-5.

509. *Estate of Hardy*, 703 N.E.2d at 707.

510. See *id.*

511. See *id.*

512. See *id.* at 710-11 (citing IND. ADMIN. CODE tit. 45 r. 4.1-2-9(a) (1996)).

only on the interests of the joint owners immediately before the decedent's death.⁵¹³ For example, it would allow survivors who had contributed nothing for their interest in property to avoid taxation on one-half the value of that property or, as in this case, it would require a survivor to pay inheritance tax to receive something he already purchased.⁵¹⁴ Therefore, the court held, because Dale had contributed 100% of the purchase price of the property, the exercise of his survivorship rights were was not subject to inheritance tax.⁵¹⁵

I. Indiana Financial Institutions Tax

In *First Chicago NBD Corp. v. Department of State Revenue*,⁵¹⁶ the tax court held that Indiana's Financial Institutions Tax ("FIT") does not require a taxpayer to add back payments made under the Michigan Single Business Tax ("MSBT").⁵¹⁷ The case was heard after the IDSR assessed First Chicago NBD Corp. f/k/a NBD Bancorp. Inc. ("NBD"), with additional FIT and interest for the years 1992 and 1993. The IDSR argued that NBD must add back⁵¹⁸ its MSBT payments that were deducted in computing NBD's federal taxable income for those years.⁵¹⁹ According to the IDSR, the add-back was required because the MSBT is a tax based on or measured by income.⁵²⁰

In finding in favor of NBD, the court held that the MSBT is not a based on or measured by income.⁵²¹ The MSBT is essentially a value added tax ("VAT") imposed on the taxpayer's total business activity and is measured by the cost of producing its product.⁵²² Unlike a tax based on income, VAT can be owed even when a company fails to make a profit.⁵²³ To calculate a taxpayer's MSBT, various adjustments are made to its federal taxable income to arrive at a tax base.⁵²⁴ This tax base is divided among the states where the taxpayer does business.⁵²⁵ A tax equal to 2.35% is then assessed on that portion of the tax base

513. See *id.* at 710.

514. See *id.*

515. See *id.* at 711.

516. 708 N.E.2d 631 (Ind. Tax Ct. 1999).

517. Under section 6-5.5-1-2 of the Indiana Code, The FIT is assessed on a taxpayer's Indiana adjusted gross income, which is based on federal taxable income as computed under IRC § 63. See IND. CODE § 6-5.5-1-2 (1998).

518. Section 6-5.5-1-2(a)(7) of the Indiana Code requires the add back of taxes "based on or measured by income" to federal taxable income in computing FIT liability. IND. CODE § 6-5.5-1-2(a)(7).

519. See *First Chicago NBD Corp.*, 708 N.E.2d at 632-33.

520. See *id.* at 634.

521. See *id.* at 635.

522. See *id.* at 633.

523. See *id.*

524. See *id.* at 633-34.

525. See *id.*

attributable to Michigan.⁵²⁶

The court held that while income is one element of the MSBT, it is not a tax based on or measured by income.⁵²⁷ Rather, the use of the income information was simply a way to quantify the value added by the production of the product.⁵²⁸ The court cited the decisions of several courts in other jurisdictions, including Michigan, which also held that the MSBT is not a tax that is based on or measured by income.⁵²⁹

J. Indiana Tax Credits

In *CNB Bancshares, Inc. v. Department of State Revenue*,⁵³⁰ the tax court interpreted the statutory requirements for claiming the enterprise zone ("EZ") loan interest credit.⁵³¹ The credit is part of the EZ program designed in part to stimulate development in certain economically depressed areas.⁵³² In addition to providing the credit to encourage taxpayers to loan money to businesses and individuals located in the EZ, the program provides credits directly to EZ businesses.⁵³³ A zone business receiving tax credits under the program must pay an annual registration fee and reinvest any credit proceeds back into the EZ.⁵³⁴

In this case, CNB Bancshares, Inc. ("CNB"), located in Evansville, was denied a loan interest credit it claimed for interest it received from loans made to businesses and individuals located in the Evansville EZ.⁵³⁵ The IDSR argued that CNB was itself a zone business and therefore subject to the registration and reinvestment requirement in order to maintain its eligibility for the loan interest credit.⁵³⁶

The court relied on the plain language of the relevant statutes in finding for CNB.⁵³⁷ It explained that the registration and reinvestment requirements are only applicable to EZ businesses.⁵³⁸ As defined by statute, an EZ business is any business claiming a credit provided under chapter 4-4-6.1.⁵³⁹ CNB, however, was not a zone business under this definition because it was claiming the loan interest

526. See MICH. COMP. LAWS ANN. § 208.31(1) (West 1998).

527. See *First Chicago NBD Corp.*, 708 N.E.2d at 635.

528. See *id.* at 634.

529. See *id.*

530. 706 N.E.2d 616 (Ind. Tax Ct. 1999).

531. Section 6-3.1-7-2 of the Indiana Code provides qualifying taxpayers a credit against state tax liability equal to 5% of the amount of interest received from qualified loans during a tax year. See IND. CODE § 6-3.1-7-2 (1998) (amended 2000).

532. See *CNB Bancshares*, 706 N.E.2d at 616.

533. See IND. CODE § 4-4-6.1-2.5.

534. See *id.* § 4-4-6.1-2(a)(4).

535. See *CNB Bancshares*, 706 N.E.2d at 617.

536. See *id.* at 618.

537. See *id.*

538. See *id.* at 619.

539. See IND. CODE § 4-4-6.1-1.1 (1998) (amended 2000).

credit provided by section 6-3.1-7-2.⁵⁴⁰ That credit, explained the court, is available to any taxpayer receiving interest income from a qualified loan.⁵⁴¹ Accordingly, the requirements under section 4-4-6.1-2⁵⁴² do not apply to taxpayer's who lend money to zone businesses.⁵⁴³

540. See *CNB Bancshares*, 706 N.E.2d at 619 (citing IND. CODE § 6-3.1-7-2).

541. See *id.*

542. See IND. CODE § 4-4-6.1-2.

543. The court explained that the IDSR's position would effectively nullify any incentive for a taxpayer to loan money to a zone business if that taxpayer was then required to reinvest any resulting tax credit into the EZ. See *CNB Bancshares*, 706 N.E.2d at 619 n.5.

RECENT DEVELOPMENTS IN TELECOMMUNICATIONS LAW

ANGELA D. O'BRIEN*

INTRODUCTION

It has been four years since President Clinton signed the revolutionary and ambitious Telecommunications Act of 1996¹ ("TA 96" or "the Act") in order to remove barriers to competition in the local telecommunications market and provide all Americans with access to affordable telecommunications service. Since that time, and particularly within the past year, there have been a large number of regulatory and judicial decisions at the federal and state levels that endeavor to implement the goals of the Act and to regulate telecommunications carriers under specific provisions of state law. This Article reviews some of the significant developments in federal and Indiana telecommunications law² for the period of October 1, 1998 to October 31, 1999.

I. IMPLEMENTATION OF LOCAL COMPETITION

The Act's goal is to eliminate barriers to local competition in the telecommunications marketplace by requiring that incumbent local exchange carriers ("ILECs") provide access to their networks to competitive local exchange carriers ("CLECs"). This access is facilitated by requiring ILECs

(1) to permit a requesting new entrant in the [ILEC's] local market to interconnect with the [ILEC's] existing local network and thereby use the [ILEC's] network to compete with the [ILEC] in providing telephone services (interconnection); (2) to provide its competing

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1. Pub. L. 104-104, 110 Stat. 56 (codified at 47 U.S.C. § 151 (Supp. III 1997)).

2. In addition to state law developments, this survey Article primarily concerns issues related to the implementation of the local competition and universal service provisions set forth in Title I of the Act, "Telecommunications Services," and does not include discussion of precedent implementing: Title II, "Broadcast Services"; Title III, "Cable Services"; Title V, "Obscenity and Violence." Even with these restrictions, a discussion of the precedent issued within the survey period concerning telephony issues would constitute volumes of material. Accordingly, this survey Article covers some of the issues encountered most frequently in the author's practice and that are, or have been, the subject of proceedings before the federal and state administrative tribunals and that have resulted in significant judicial precedent. For more information concerning the issues discussed in this article and other telecommunications issues, see *Federal Communications Law Journal* (published jointly by the Indiana University School of Law in Bloomington and the Federal Communications Bar Association), the Federal Communications Commission's website at <<http://www.fcc.gov>> (visited July 26, 2000), or the Indiana Utility Regulatory Commission's website at <<http://www.state.in.us/iurc/index.html>> (visited July 26, 2000).

telecommunications carriers with access to individual elements of the [ILEC's] own network on an unbundled basis (unbundled access); and (3) to sell to its competing telecommunications carriers, at wholesale rates, any telecommunications service that the [ILEC] provides to its customers at retail rates, in order to allow the competing carriers to resell the services (resale).³

3. *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 791 (8th Cir. 1997) (footnote omitted), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). The court in *Iowa Utilities Board* cited 47 U.S.C. § 251(c) (Supp. III 1997), which provides in relevant part:

(2) Interconnection.—The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection to the local exchange carrier's network —

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.

(3) Unbundled Access.—The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale—The duty—

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with the regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such

A. The Eighth Circuit: Iowa Utilities Board v. FCC

In 1996, the Federal Communications Commission (FCC), the agency charged with implementing the Act's local competition provisions, issued *In re Implementation of the Local Competition Provisions in the Telecommunication Act of 1996*,⁴ which promulgates local competition rules. Local exchange carriers ("LECs") and state utility commissions challenged the First Report and Order on the grounds that the FCC exceeded its jurisdiction in promulgating rules regarding prices "for interconnection, unbundled access, and resale, as well as [] the rules regarding the prices for the transport and termination of local telecommunications traffic."⁵ Most of these challenges were consolidated by the Eighth Circuit in *Iowa Utilities Board v. FCC*, where the court of appeals vacated several of the FCC's local competition rules and upheld the state commissions' authority to regulate intrastate telecommunications.⁶ However, the Supreme Court granted certiorari, and, as discussed below, several of the Eighth Circuit's holdings were reversed.⁷ In order to discuss the Supreme Court's decision, it is necessary to briefly summarize the Eighth Circuit's determinations.⁸

1. *FCC's Pricing Rules.*—Petitioners challenged the FCC's rules requiring state commissions to implement the total element long-run incremental cost (TELRIC) methodology to determine the costs of ILEC facilities⁹ and the proxy rates¹⁰ to be used if the state commission chooses not to employ the TELRIC.¹¹ The court held that under the plain language of §§ 251 and 252 of the Act and § 2(b) of the Communications Act of 1934,¹² the FCC lacked statutory authority to

service to a different category of subscribers.

Id.

4. CC Docket Nos. 96-98 and 95-185, 11 F.C.C.R. 15,499 (released Aug. 8, 1996) [hereinafter First Report & Order].

5. *Iowa Utils. Bd.*, 120 F.3d at 792 (footnote omitted).

6. *See id.* at 792-94.

7. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999)j, *aff'g in part and rev'g in part* *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997).

8. The order and titles of the following issues are set forth according to the order in which they were considered in *Iowa Utilities Board v. FCC*. The following summary does not cover all of the FCC rules vacated by the Eighth Circuit. *See Iowa Utilities Board v. FCC*, 120 F.3d at 819 n.19 for a complete list of FCC rules and portions of the First Report and Order that were vacated.

9. *See id.* at 793 (citing 47 C.F.R. §§ 51.503, 51.505 (1996)).

10. *See id.* (citing 47 C.F.R. §§ 51.503(b)(2), 51.513, 51.705(a)(2), 51.707).

11. *See id.*

12. 47 U.S.C. § 152(b) (1994). This section provides in relevant part:

Except as provided in sections 223 through 227 . . . inclusive, and section 332, and subject to the provisions of section 301 of this title . . . nothing in this chapter shall be construed to apply or to give the [FCC] jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service.

promulgate these pricing rules.¹³

2. *The "Pick and Choose" Rule.*—The court vacated an FCC rule allowing carriers requesting interconnection to "pick and choose"¹⁴ favorable terms and conditions related to interconnection, service and network elements from existing interconnection agreements without having to adopt the entire interconnection agreement.¹⁵ The court found this rule to be an "unreasonable interpretation of subsection 252(i),"¹⁶ reasoning that the Act as a whole reveals Congress' preference for voluntarily negotiated interconnection agreements, and that allowing requesting carriers to adopt provisions in a "piecemeal fashion" would thwart this process.¹⁷

3. *Rural Exemptions.*—In response to claims that 47 C.F.R. § 51.405 improperly imposed additional standards on state commissions in making determinations concerning the exemption of small or rural LECs from the duties required of ILECs under the Act,¹⁸ the court found that § 251(f) gives state commissions the exclusive authority to determine rural LEC exemptions.¹⁹ Thus, the FCC did not have jurisdiction to impose standards in addition to those in § 251(f).²⁰

4. *FCC's Authority to Review State Approved Agreements.*—The court rejected the FCC's claims in the First Report and Order²¹ that the FCC possessed authority under 47 U.S.C. § 208 to review and enforce the terms of state approved interconnection agreements,²² and held that § 252(e)(6)²³ provides the "exclusive means of obtaining review of state commission determinations under the Act."²⁴

Id. The Act amends the Communications Act of 1934.

13. See *Iowa Utils. Bd.*, 120 F.3d at 794, 800.

14. See *id.* (citing 47 C.F.R. § 51.809 (1997)).

15. See *id.*

16. *Id.* at 800.

17. *Id.* at 800-01.

18. See *id.* at 801-02.

19. See *id.* at 802.

20. See *id.* at 803.

21. See First Report & Order, *supra* note 4, ¶¶ 121-128.

22. See *Iowa Utils. Bd.*, 120 F.3d at 803.

23. 47 U.S.C. § 252(e)(6) (Supp. III 1997) provides:

Review of state commission actions.—In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section.

24. *Iowa Utils. Bd.*, 120 F.3d at 804. The court further held that § 252(e) vests primary authority with the state commissions to enforce the terms of interconnection agreements approved under §§ 251 and 252 and that in any event, § 2(b) bars FCC jurisdiction over intrastate

5. *FCC Review of Preexisting Agreements.*—The court rejected the FCC's interpretation of § 252(a)(1) requiring that agreements negotiated prior to the enactment of TA 96 to be submitted for approval by the state commission²⁵ on the grounds that the FCC did not have jurisdiction under § 2(b) of the Communication Act of 1934²⁶ to determine "which interconnection agreements must be submitted for state commission approval."²⁷ The court also found that nothing within the plain language of § 252 authorized the FCC to regulate "which interconnection agreements must be submitted for state approval."²⁸

6. *State Compliance with FCC Rules.*—The court also rejected the FCC's interpretation of § 251(d)(3)²⁹ preempting "state policy that conflicts with an FCC regulation promulgated pursuant to § 251."³⁰ The court found this to be an unreasonable interpretation of § 251(d)(3), holding that the states' authority over the local telephone markets and interconnection agreements should be protected so long as state rules are consistent with § 251.³¹

7. *FCC's Unbundling Rules.*—Regarding the unbundled network element rules promulgated by the FCC:

(a) The court disagreed with arguments that operational support systems (OSS), operator services, and vertical switching features do not constitute "network elements" subject to the Act's unbundling requirements and upheld the FCC's rules qualifying these features as network elements.³²

(b) The court upheld the FCC's definition of "technically feasible"³³ as set

communications service. *See id.*

25. *See id.* at 804-05 (citing 47 C.F.R. § 51.303 (1997) (setting forth the FCC interpretation of § 252(a)(1) of the Act)).

26. 47 U.S.C. § 152(b) (1994).

27. *Iowa Utils. Bd.*, 120 F.3d at 805.

28. *Id.*

29. 47 U.S.C. § 251(d)(3) (Supp. III 1997) provides:

In prescribing and enforcing regulations to implement the requirements of this section, the [FCC] shall not preclude the enforcement of any regulation, order, or policy of a State commission that—

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section;

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

Id.

30. *Iowa Utils. Bd.*, 120 F.3d at 806.

31. *See id.* at 807.

32. *See id.* at 808-09 (upholding 47 C.F.R. §§ 51.319(f-g) (1997)).

33. The Act provides for interconnection and unbundled access at any "technically feasible point." *Id.* at 810 (quoting 47 U.S.C. §§ 251(c)(2), (3)).

forth in 47 C.F.R. § 51.5,³⁴ despite claims that disregarding the economic costs at points of interconnection (POI) could result in “[ILECs] having to incur unwarranted expenses in order to meet the demands of competing carriers seeking access to their networks.”³⁵ Although the court upheld the FCC’s definition of “technically feasible,” the court rejected the FCC’s finding “that [because] it is technically feasible to unbundle a particular element[, there is] a presumption that the element must be unbundled”³⁶

(c) In determining which network elements ILECs should be required to make available to requesting carriers under § 251(d)(2) of the Act, the FCC must consider whether access to proprietary network elements is “*necessary* and whether the failure to provide access to a network elements would *impair* the ability” of the requesting carrier to provide telecommunications service.³⁷ The court upheld the FCC’s interpretation of the “necessary” and “impair” standards as not “requir[ing] an evaluation of whether a requesting carrier could obtain the desired elements from an alternative source.”³⁸ Additionally, the court upheld the FCC’s interpretation that a proprietary network element is “‘necessary’ if a requesting carrier’s ability to compete would be ‘significantly impaired or thwarted’”³⁹ and the FCC’s interpretation of “impair” as whether “the quality of service the entrant can offer, absent access to the requested element, declines and/or the cost of providing the service rises.”⁴⁰

(d) The court vacated the FCC’s “Superior Quality Rules” which require ILECs to provide interconnection, unbundled network elements, and unbundled access to requesting carriers at levels of quality greater than the ILEC provides to itself,⁴¹ on the grounds that such requirement violates the plain language of § 251(c).⁴²

(e) The court found that the FCC’s rules that prohibited ILECs from unbundling network elements purchased by competing carriers,⁴³ were contrary to the terms of § 251(c)(3).⁴⁴ Allowing a competing carrier to purchase a

34. 47 C.F.R. § 51.5 (1999) provides in pertinent part: “A determination of technical feasibility does not include consideration of economic, accounting, billing, space, or site concerns”

35. *Iowa Utils. Bd.*, 120 F.3d at 810. The court held that additional costs would be accounted for in the determination of just and reasonable rates and that “an [ILEC] will recoup the costs involved in providing interconnection and unbundled access from the competing carriers making these requests.” *Id.*

36. *Id.* (citations omitted).

37. *Id.* (emphasis added) (citing 47 U.S.C. § 251(d)(2)(A-B) (Supp. III 1997)).

38. *Id.* at 811 (citing First Report & Order, *supra* note 4, ¶ 283).

39. *Id.* (quoting First Report & Order, *supra* note 4, ¶ 282).

40. *Id.* at 812 (quoting First Report & Order, *supra* note 4, ¶ 285).

41. See 47 C.F.R. §§ 51.305(a)(4), 51.311(c) (1999).

42. See *Iowa Utils. Bd.*, 120 F.3d at 812-13.

43. See 47 C.F.R. § 51.315(b-f).

44. See *Iowa Utils. Bd.*, 120 F.3d at 813. The Eighth Circuit issued an Order on Petition for Rehearing dated October 14, 1997 striking the language appearing under Part II(G)(1)(f) of the

complete “platform”⁴⁵ of the network elements to create a finished service at cost would eviscerate § 251(c)(4) which allows competing carriers to purchase an ILEC’s telecommunications services at wholesale rates for resale.⁴⁶

8. *Dialing Parity*.—In a separate proceeding,⁴⁷ the court held that the FCC lacked jurisdiction to implement its rules⁴⁸ regarding dialing parity⁴⁹ to the extent that those rules apply to intraLATA (local access and transport area) traffic.⁵⁰

B. The U.S. Supreme Court: *AT&T v. Iowa Utilities Board*

The FCC and several parties appealed the decisions, and the U.S. Supreme Court granted certiorari⁵¹ to review the Eighth Circuit’s holdings regarding the FCC’s jurisdiction to implement local competition provisions, the unbundled network element rules, and the “pick and choose” rule.⁵²

1. *FCC’s Jurisdiction to Implement Local Competition Provisions*.—The Court’s analysis of the FCC’s jurisdiction to implement local competition provisions primarily concerned the application of two statutory provisions. First, § 201(b)⁵³ of the Communications Act of 1934 expressly gives the FCC authority to “prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.”⁵⁴ Reasoning that TA 96 was intended to supplement the Communications Act of 1934, the Court concluded that the FCC’s rulemaking authority under § 201(b) extended to the Act’s local competition provisions.⁵⁵ In reaching this conclusion, the Court rejected the Eighth Circuit’s reliance on language in § 201(a), which prescribes “the dut[ies] of every common carrier engaged in *interstate or foreign* communications,”⁵⁶ and held that the FCC’s jurisdiction extended only to those communications that were “interstate and foreign.”⁵⁷ The Court noted that a limitation on the class of common carriers charged with the duty set forth in § 201(a) did not act as a

opinion dated July 18, 1997 found at 120 F.3d 753, 813 and substituting language which vacates 47 C.F.R. § 51.315(b-f).

45. *Iowa Utils. Bd.*, 120 F.3d at 813.

46. *See id.*

47. *See California v. FCC*, 124 F.3d 934 (8th Cir. 1997).

48. *See* 47 C.F.R. §§ 51.205-51.215.

49. “Dialing parity” refers to the “technological capability that enables a telephone customer to route a call over the network of the customer’s preselected carrier without having to dial an access code of extra digits.” *California v. FCC*, 124 F.3d at 939 (citation omitted).

50. *See id.* at 943.

51. 522 U.S. 1089 (1998) (mem.).

52. *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

53. Section 201(b) was added to Communications Act of 1934 in 1938. *See* Pub. L. No. 75-561, 52 Stat. 588 (1938).

54. 47 U.S.C. § 201(b) (1994).

55. *AT&T*, 525 U.S. at 377-78.

56. 47 U.S.C. § 201(a) (emphasis added).

57. *See AT&T*, 525 U.S. at 378.

limitation on the FCC's rulemaking authority set forth in § 201(b).⁵⁸ Furthermore, given the Court's construction of § 201(b), arguments that the Act expressly confers jurisdiction on the FCC to implement the local competition provisions only in certain sections (e.g., §§ 251(d), 251(b)(2), 251(c)(4)(B), 251(d)(2), 251(g), and 251(h)(2)) were dismissed.⁵⁹

Second, some parties argued that the FCC's rulemaking authority to implement local competition provisions was circumscribed by § 2(b)⁶⁰ because the local competition provisions are not among those sections contained in § 2(b)'s "except clause." Thus, the FCC's implementation of the local competition provisions required an express grant of FCC jurisdiction over intrastate service.⁶¹ The Court rejected this position, again citing the express grant of FCC jurisdiction contained in § 201(b). Moreover, examination of § 2(b) supported the majority's conclusion that the language in § 2(b), "nothing in this Act shall be considered to apply or to give the Commission jurisdiction . . .," did not create a mutually exclusive alternative as argued by the Respondents, but rather two distinct limitations: "[t]he term 'apply' limits the substantive reach of the statute (and the concomitant scope of primary FCC jurisdiction), and the phrase 'or give the Commission jurisdiction' limits, in addition, the FCC's ancillary jurisdiction."⁶²

58. See *id.* The logic of the majority's holding on this issue is exemplified by Justice Scalia's rejection of Justice Breyer's "appeal[] to our cases which say that there is a 'presumption against the preemption of state police power regulations.'" *Id.* at 730 n.6 (citation omitted). Justice Scalia stated:

[T]he question in this case is not whether the Federal Government has taken the regulation of local competition away from the States. With regard to the matters of addressed by the 1996 Act, it unquestionably has. The question is whether the state commissions' participation in the administration of the new federal regime is to be guided by federal-agency regulations. If there is any "presumption" applicable to this question, it should arise from the fact that a federal program administered by 50 independent state agencies is surpassing strange.

The appeals by Justice THOMAS and Justice BREYER to what might loosely be called "States' rights" are most peculiar, since there is no doubt, even under their view, that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel. This is, at bottom, a debate not about whether the States will be allowed to do their own thing, but about whether it will be the FCC or the federal courts that draw the lines to which they must hew.

Id.

59. See *id.* at 383.

60. See *id.* at 379 (quoting 47 U.S.C. § 152(b)).

61. See *id.* at 380.

62. *Id.* at 731 (citing *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986)). According to the Court, the need for two limitations is "exemplified" by the two arguments raised by the FCC in *Louisiana Public Service Commission* regarding its rulemaking authority over depreciation methods used by local telephone companies. *Id.* In the above case, the Court rejected

In addition to upholding the FCC's general rulemaking authority under §§ 201 and 2(b), the Court upheld the FCC's authority to promulgate rules regarding TELRIC pricing, states' review of preexisting interconnection agreements, rural exemptions, and dialing parity, despite claims that certain sections of the Act negated aspects of the FCC's authority.⁶³ Regarding TELRIC pricing, Respondents cited § 252(c), which provides in relevant part:

In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, *a state commission shall—*

(1) ensure that such resolution and conditions meet the requirements of section 251, *including the regulations*

the FCC's argument that the intent of the Communications Act was that depreciation provisions would apply to the states. The Court held that such provisions could not be read to negate § 2(b). *See id.* (citing *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 376-77). Alternatively, the Court rejected the FCC's argument that it could regulate intrastate depreciation methods if such would affect interstate telecommunications on the grounds that under § 2(b), the FCC could not regulate intrastate telecommunications solely to further the federal goal of increasing interstate telecommunications. *See id.* (citing *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 369).

In *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 423 (5th Cir. 1999), the Fifth Circuit succinctly explained the Supreme Court's holding concerning the FCC's jurisdiction under § 201(b) and § 2(b):

Though § 2(b)'s language stating that "nothing in this Act shall be construed to apply or to give the Commission jurisdiction" implies that FCC jurisdiction does not always follow where the Act applies, the [Supreme] Court held that "the term 'apply' limits the substantive reach of the statute . . . and the phrase 'or the Commission's jurisdiction' limits . . . the FCC's *ancillary* jurisdiction.

* * *

In reconciling its holding with *Louisiana PSC*, the Court held that the FCC must show that the meaning of a statutory provision *applies* to intrastate matters in an "unambiguous and straightforward" manner as to "override the command of § 2(b)." If the agency fails in this initial task, it cannot use its normally broad regulatory authority to assert what is now only *ancillary* jurisdiction because of the still intact jurisdictional fence created by § 2(b). Therefore, after [*AT&T v. Iowa Utilities*], § 2(b) still serves as (1) a rule of statutory construction requiring the FCC to find unambiguous statutory authority *applying* to intrastate matters and (2) a jurisdictional barrier restricting the agency from using its plenary authority to assert *ancillary* jurisdiction by "taking intrastate action solely because it further[s] an interstate goal."

Texas Office, 183 F.3d at 423 (footnotes omitted) (citing *AT&T*, 525 U.S. at 380-81; *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 374).

63. *See AT&T*, 525 U.S. at 385 (reinstating 47 C.F.R. §§ 51.303, 51.405, and 51.205-215 (1999)).

prescribed by the Commission pursuant to section 251.

(2) *establish any rates* for interconnection, services, or network elements according to subsection (d).⁶⁴

Despite arguments that § 252(c)(2) confers state commissions with the authority to “establish any rates,” the Court found the TELRIC pricing rule, in prescribing a pricing methodology, did not infringe on the State commissions’ duty to “establish [] rates for interconnection, services, or network elements”⁶⁵ any more than the pricing standards set forth in subsection (d).⁶⁶

The Court further addressed the apparent “lack of parallelism” between subsections (c)(1) and (c)(2) evidenced by the proviso in (c)(1) concerning the states’ duty to ensure compliance with § 251 including the FCC’s rules implementing that section.⁶⁷ This “lack of parallelism” is logically explained by the fact that § 251(d)(1) expressly requires the FCC to promulgate rules and regulations to implement that section.⁶⁸ The Court held that regardless, any “lack of parallelism” did not override the FCC’s authority to implement the provisions of the Act under § 201(d).⁶⁹ Under the same rationale, the Court reversed the Eighth Circuit’s decisions upholding the FCC’s rules regarding preexisting agreements, rural exemptions, and dialing parity holding that “[n]one of the statutory provisions that these rules interpret displaces the Commission’s general

64. 47 U.S.C § 252(c)(1-2) (Supp. III 1997) (emphasis added).

65. *Id.*

66. *See AT&T*, 525 U.S. at 384. The Court explained:

We think this attributes to [the State commissions’] task a greater degree of autonomy than the phrase “establish any rates” necessarily implies . . . It is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances. That is enough to constitute the establishment of rates.

Id.

Although this holding is consistent with Court’s decisions to uphold the FCC’s jurisdiction to implement local competition rules, the Court’s rationale begs the question of the extent to which State commissions enjoy autonomy under the Act’s express delegations of power. Pursuant to the Court’s analysis, the States’ authority is severely limited. The Court noted that the Act assume[s] a scheme in which Congress has broadly extended its law into the field of intrastate telecommunications, but in a few specified areas (ratemaking, interconnection agreements, etc.) has left the policy implications of that extension to be determined by state commissions, which—within the broad range of lawful policymaking left open to the administrative agencies—are beyond federal control. Such a scheme is decidedly novel, and the attendant legal questions, such as whether federal courts must defer to state agency interpretations of federal law, are novel as well.

Id. at 385 n.10.

67. *Id.*

68. *Id.*

69. *Id.*

rulemaking authority.”⁷⁰

2. *FCC’s Unbundling Rules.*—

(a) ILECs challenged the FCC’s rules⁷¹ regarding network elements arguing that the FCC improperly included OSS, operator services and directory assistance (“OS/DA”), and vertical switching functions⁷² within the definition of “network elements.”⁷³ ILECs argued that a “‘network element’ must be part of the physical facilities and equipment used to provide local phone service.”⁷⁴ Finding that the definition of “network element” in § 153(29) was sufficiently broad to include OSS, OS/DA and vertical switching functions, the Court rejected the ILECs argument and upheld the Eighth Circuit’s determination that the FCC’s interpretation of network element was reasonable.⁷⁵

(b) However, the Court did not agree with the FCC’s interpretation of the “necessary” and “impair” standards under § 251(d)(2)(A & B).⁷⁶ The Court began its analysis by noting that the FCC requires ILECs to provide requesting carriers with a minimum of seven unbundled network elements,⁷⁷ and that a requesting carrier can petition the state commission for additional elements.⁷⁸ ILECs argued that § 251(d)(2) of the Act served only as a means to supply access to those network elements otherwise unavailable.⁷⁹ The FCC should therefore “apply some limiting standard, rationally related to the goals of the Act, which it has simply failed to do.”⁸⁰ In contrast, the FCC’s interpretations of the

70. *Id.* Furthermore, the Court noted that § 251(b)(3), governing dialing parity, “does not even mention the States, [and thus] it is even clearer that the Commission’s § 201(b) authority is not superseded.” *Id.*

71. See 47 C.F.R. §§ 51.319(f-g) (1999); First Report & Order, *supra* note 4, ¶413.

72. Vertical switching functions include services such as caller I.D., call forwarding, and call waiting. See *AT&T*, 525 U.S. at 386.

73. *Id.* A “network element” is defined by the Act as:

[A] facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of telecommunications service.

47 U.S.C. § 153(29) (Supp. III 1997).

74. *AT&T*, 525 U.S. at 387.

75. See *id.* (citing *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 866 (1984)).

76. See *id.*

77. See *id.* at 387-88. These network elements include: “the local loop, the network interface device, switching capability, interoffice transmission facilities, signaling networks and call-related databases, operations support system functions, and operator services and directory assistance.” *Id.* (citing 47 C.F.R. § 51.319 (1997)).

78. See *id.* at 388 (citing 47 C.F.R. § 51.317).

79. See *id.*

80. *Id.* ILECs analogized § 251(d)(2) to the “essential elements” doctrine in antitrust law whereby the ILECs would make available “only those ‘bottleneck’ elements unavailable elsewhere

"necessary" and "impair" standards effectively gave requesting carriers "blanket access" to the ILECs' networks.⁸¹

For example, the FCC's "impair" standard requires a determination as to whether

the failure of an incumbent to provide access to a network element would decrease the quality, or increase the financial or administrative cost of the service a requesting carrier seeks to offer, compared with providing that service over other unbundled elements in the incumbent LEC's network.⁸²

This standard, by its terms, necessarily excludes consideration of "self provision or . . . purchasing from another provider," and "[s]ince any entrant will request the most efficient network element that the incumbent has to offer, it is hard to imagine when the incumbent's failure to give access to the element would not constitute an 'impairment' under this standard."⁸³ According to the Court, the FCC's limitation of inquiry to ILECs under the "impair" standard unreasonably shifts the determinations of whether access to a proprietary network element is "necessary" and whether the failure to gain access to a non-proprietary network element would "impair" the provision of service from the FCC to the requesting carrier.⁸⁴ Furthermore, the Court rejected the FCC's reasoning that an increase in cost or decrease in quality resulting from the denial of a network element necessarily renders access to that element "necessary," and thus, failure to provide access to that element would "impair" the ability of the requesting carrier to provide service.⁸⁵

in the marketplace." *Id.* However, the Court declined to decide whether such standard is required by the Act as a matter of law. *See id.*

81. *Id.* at 390.

82. First Report & Order, *supra* note 4, ¶ 285.

83. *AT&T*, 525 U.S. at 389.

84. *Id.*

85. *Id.* at 389-90. To illustrate, the Court noted that a requesting carrier whose anticipated annual profits from the proposed service are reduced from 100% of investment to 99% of investment has perhaps been "impaired" in its ability to amass earnings, but has not ipso facto been "impaired . . . in its ability to provide the service it seeks to offer"; and it cannot realistically be said that the network element enabling it to raise its profits to 100% is necessary.

Id. at 390.

Commenting on Justice Souter's dissent, the majority also offered the following analogy: JUSTICE SOUTER points out that one can say his ability to replace a light bulb is "impaired" by the absence of a ladder, and that the ladder is "necessary" to replace the bulb, even though one "could stand instead on a chair, a milk can, or eight volumes of Gibbon." True enough (and nicely put), but the proper analogy here, it seems to us, is not the absence of a ladder, but the presence of a ladder tall enough to enable one to do the job, but not without stretching one's arm to its full extension. A ladder one-half inch taller is not, "within an ordinary and fair meaning of the word," "necessary," nor

The FCC's interpretation is based upon its misinterpretation of § 251(c)(3), which requires ILECs to provide access to network elements "at any technically feasible point"⁸⁶ as imposing a duty upon ILECs to make available "all network elements for which it is technically feasible to provide access."⁸⁷ Agreeing with the interpretation of the Eighth Circuit, the Court held that § 251(c)(3) "indicates 'where unbundled access must occur, not which [network] elements must be unbundled.'"⁸⁸ The FCC's application of the "necessary" and "impair" standards under § 251(d)(2)(A-B) were based on the false premise that § 251(c)(3) allowed access to all network elements and thus the FCC, interpreting both § 251(c)(3) and § 251(d)(2), reached the erroneous conclusion that "the proprietary and impairment standards in § 251(d)(2) grant us the authority to refrain from requiring incumbent LECs to provide all network elements for which it is technically feasible to provide access on an unbundled basis."⁸⁹ According to the Court:

Section 251(d)(2) does not authorize the [FCC] to create isolated exemptions from some underlying duty to make all network elements available. It requires the Commission to determine on a rational basis which network elements must be made available, taking into account the objectives of the Act and giving some substance to the "necessary" and "impair" requirements.⁹⁰

The Court concluded that the FCC's unreasonable application of § 251(d)(2) governed the consideration of several network elements, and accordingly, the Court vacated 47 C.F.R. § 51.319 (1997).⁹¹

This holding also largely disposed of the ILECs' argument regarding the "all elements" rules, which allow requesting carriers to provide complete service solely through the purchase of unbundled network elements.⁹² The Court noted

does its absence "impair" ones ability to do the job.

Id. at 390 n.11 (quoting *id.* at 399 (Souter, J., concurring in part and dissenting in part)) (citations omitted).

86. *Id.* at 391 (citing 47 U.S.C. § 251(c)(3) (Supp. III 1997)).

87. *Id.* (quoting First Report & Order, *supra* note 4, ¶ 278).

88. *Id.* (quoting *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 810 (8th Cir. 1997), *aff'd in part, rev'd in part sub. nom. AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999)). While the Eighth Circuit's holding regarding the FCC's interpretation of 251(c)(3) was not at issue before the Court, it was noted that the FCC's misapplication of 251(d)(2) "was colored by [the Eighth Circuit's] error." *Id.*

89. *Id.* (quoting First Report & Order, *supra* note 4, ¶ 279)

90. *Id.* at 391-92.

91. *See id.* The FCC has since issued its response to the Supreme Court's mandate that it revise the "necessary" and "impair" standards of § 251(d)(2) for the purposes of determining unbundling obligations under § 251(c)(3). *See In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, No. 96-98 15 F.C.C.R. 3696 (Released Nov. 5, 1999).

92. *See AT&T*, 525 U.S. at 392 (citing First Report & Order, *supra* note 4, ¶¶ 328-340.) Recall that ILECs argued to the Eighth Circuit that a requesting carrier should at least partially own

that the FCC may, on remand, make fewer unbundled network elements available such that the ability to provide complete service through unbundled network elements is no longer possible.⁹³ Regardless, the Court agreed with the Eighth Circuit in upholding the FCC's refusal to implement a requirement that requesting carriers own their own facilities before purchasing unbundled network elements, finding that the Act did not impose such a requirement.⁹⁴

(c) As stated, the FCC's pricing rule imposes the TELRIC pricing methodology, allowing requesting carriers to lease network elements at cost, and 47 C.F.R. § 51.319 and the "all elements" rule allow the requesting carrier to rely solely on an ILEC's network to obtain virtually all elements on an unbundled basis.⁹⁵ When these rules are combined with 47 C.F.R. § 51.315(b) ("Rule 315(b)"), which prohibits an ILEC from unbundling bundled network elements, a requesting carrier "can lease a complete, preassembled network at (allegedly very low) cost-based rates."⁹⁶

Understandably, ILECs argued that such a result could not possibly be consistent with the legislative intent underlying the Act.⁹⁷ For example, § 251(c)(4) provides that ILECs have the duty "to offer for resale *at wholesale rates* any telecommunications service . . ."⁹⁸ Thus, allowing a requesting carrier to "construct" a network to provide complete services at cost-based rates would nullify the resale provisions of the Act.⁹⁹ In addition, ILECs pointed out the fact that local phone rates contain universal service subsidies to help keep rural and residential services low.¹⁰⁰ These universal service subsidies are built into the retail rates, and are thus passed on through resale rates.¹⁰¹ However, a competing carrier, by leasing its network at cost, can not only avoid the universal service subsidy built into the retail rates but also can cherry pick business customers by offering lower rates (that do not include the subsidy), depleting the ILECs' source of subsidies for high-cost rural and residential customers.¹⁰²

its own facilities to provide local service before purchasing unbundled network elements from ILECs. *See Iowa Utils. Bd.*, 120 F.3d at 814.

93. *See AT&T*, 525 U.S. at 392.

94. *See id.* at 392-93. The Court stated that the Act actually suggested the opposite given the requirement set forth in § 251(c)(3) that access must be provided to "any requesting telecommunications carrier." *Id.* at 393.

95. *See id.*

96. *Id.*

97. *See id.*

98. 47 U.S.C. § 251(c)(4) (Supp. III 1997) (emphasis added).

99. *AT&T*, 525 U.S. at 376-77; *see also Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

100. *See AT&T*, 525 U.S. at 393. Under such universal service subsidies, "[b]usiness customers, for whom the cost of service is relatively low, are charged significantly above cost to subsidize service to rural and residential customers, for whom the cost of service is relatively high." *Id.*

101. *See id.*

102. *See id.*

The Court rejected out of hand these legitimate arguments stating only that given the Court's disposition of Rule 319, ILECs concern *may* be rendered "academic."¹⁰³ The Court provided no explanation as to the apparent conflict between the application of Rule 315(b) and the resale provisions under § 251(c)(4) as adeptly described by the Eighth Circuit:

To permit such an acquisition of already combined elements at cost based rates for unbundled access would obliterate the careful distinctions Congress has drawn in subsections 251(c)(3) and (4) between access to unbundled network elements on the one hand and the purchase at wholesale rates of an incumbent's telecommunications retail services for resale on the other.¹⁰⁴

The Court's inexplicable holding, allowing competing carriers to use Rule 315(b) to lease a complete network at cost-based rates, obviates the Act's resale provisions and eviscerates § 251(c)(4).¹⁰⁵ Similarly, ILECs' universal service argument was also summarily dismissed under the reasoning that "§ 254 requires that universal-service subsidies be phased out, so whatever possibility of arbitrage remains will be only temporary."¹⁰⁶

103. *Id.*

104. *Iowa Utils. Bd.*, 120 F.3d at 813.

105. The Court, however, acknowledged that:

It would be a gross understatement to say that the Telecommunications Act of 1996 is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction. That is most unfortunate for a piece of legislation that profoundly affects a crucial segment of the economy worth tens of billions of dollars. The 1996 Act can be read to grant (borrowing a phrase from incumbent GTE) "most promiscuous rights to the FCC vis-a-vis the state commissions and to competing carriers vis-a-vis the incumbents—and the [FCC] has chosen in some instances to read it that way. But Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency. We can only enforce the clear limits that the 1996 Act contains, which in the present case invalidate only Rule 319.

AT&T, 525 U.S. at 397 (citation omitted).

106. *Id.* at 393-94. The Court's statement regarding the requirement that universal service subsidies be phased out provides no specific citation to authority within § 254. Given the context of the ILECs' argument and the Court's discussion, it is clear that the Court is referring to implicit, as opposed to explicit, universal service subsidies. The Court is likely referring to § 254(f), which provides in relevant part that:

A state may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.

47 U.S.C. § 254(f) (Supp. III 1997).

Section 254 has been interpreted as not requiring the elimination of implicit universal service support mechanisms at the state level. See *In re Federal-State Joint Board on Universal Service*,

The decision to reverse the Eighth Circuit's holding vacating Rule 315(b) was based on the Court's belief that the FCC reasonably interpreted the language of § 251(c)(3).¹⁰⁷ Finding the language of § 251(c)(3) to be ambiguous as to whether or not network elements must be separated,¹⁰⁸ the Court held that the language in § 251(c)(3), requiring elements to be provided in a manner that "allows requesting carriers to combine" them, did not foreclose the FCC's prohibition on unbundling combined network elements.¹⁰⁹ The Court stated that § 251(c)(3) "does not say, or even remotely imply that elements must be provided in this fashion and never in combined form."¹¹⁰ Additionally, the Court rejected the notion that the language requiring ILECs to make network elements available "on an unbundled basis" necessarily means that those network elements must be "physically separated."¹¹¹ Admitting that Rule 315(b) allows competing carriers "access to an entire preassembled network" at cost-based prices, the Court nevertheless found that the FCC reasonably interpreted the "nondiscriminatory access" provision in § 251(c)(3)¹¹² in promulgating Rule 315(b) to prevent ILECs from engaging in anti-competitive conduct by deliberately unbundling combined network elements for no "productive reason."¹¹³

3. *FCC's "Pick and Choose" Rule.*—Finally, the Court reversed the Eighth Circuit and upheld the FCC's "Pick and Choose" Rule as a reasonable and most readily apparent construction of § 252(i) of the Act,¹¹⁴ rejecting ILECs'

13 F.C.C.R. 24,744 (released Nov. 25, 1998) (Separate Statement of Public Counsel Margaret Hogerty) ("The recommendation focuses on reasonable comparability and not on the elimination of implicit support Section 254 does not require that regulators take measures to identify and eliminate all 'implicit support' Consistent with our view on implicit support, there is no recommendation that a state remove implicit support or that a state establish a universal service fund."). This interpretation and the fact that local telecommunication services are still implicitly subsidized, casts doubt upon the Court's opinion that "whatever possibility of arbitrage remains will only be temporary." *AT&T*, 525 U.S. at 394. In addition, whether Congress intended to put ILECs at such a competitive disadvantage must be questioned. Although promoting competition by the elimination of access barriers is proper, Congress most likely did not intend to saddle ILECs with inherently unfair disadvantages.

107. See *AT&T*, 525 U.S. at 394.

108. See *id.* at 395.

109. *Id.*

110. *Id.* at 394.

111. *Id.*

112. *Iowa Utils. Bd. v. FCC*, 120 F.3d, 753 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

113. *AT&T*, 525 U.S. at 395.

114. See *id.* at 396. The Court found that the "Pick and Choose" Rule, 47 C.F.R. § 51.809 (1999) tracks § 251(i) almost exactly. See *id.* Section 252(i) provides:

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

arguments that this Rule

threatens the give-and-take of negotiations, because every concession as to an “interconnection, service, or network element arrangement” made (in exchange for some other benefit) by an [ILEC] will automatically become available to every potential entrant into the market. A carrier who wants one term from an existing agreement [] should be required to accept all the terms in the agreement.¹¹⁵

The Court correctly observed that in certain respects the “Pick and Choose” Rule is “more generous” to the ILECs than § 252(i).¹¹⁶ For example, the “Pick and Choose” Rule exempts certain ILECs that can demonstrate that providing the requested interconnection is “more costly than providing it to the original carrier” or “technically infeasible,”¹¹⁷ and limits the amount of time in which a carrier can request an interconnection, service or network element under § 252(i).¹¹⁸ Ultimately, deference to the FCC’s interpretation of § 252(i) against ILECs’ opposing arguments was the result of the Court’s recognition that “whether the [FCC’s] approach will significantly impede negotiations . . . is a matter eminently within the expertise of the Commission and eminently beyond our ken.”¹¹⁹

The Eighth Circuit’s and Supreme Court’s analyses of the FCC’s rules and regulations implementing the Act’s local competition provisions demonstrate, at the very least, the Act’s ambiguity regarding the respective roles taken by the FCC and the state commissions in regulating intrastate telecommunications. The Supreme Court clarifies these ambiguities in its decision to uphold the FCC’s rules attacked by the state commissions and ILECs pursuant to the general grant of authority under § 201(b). The questions remain, however, regarding the extent to which state commissions may determine the policy implications of the extension of federal law into intrastate telecommunications and the extent to which “federal courts must defer to state agency interpretations of federal law.”¹²⁰ These are frequently recurring but unanswered questions at the local level, as the state commissions attempt to implement the Act’s provisions regarding local competition. Ultimately, it will be necessary to address these questions lest the “surpassing strange” result of a “federal program administered by 50 independent state agencies” occur.¹²¹

47 U.S.C. § 252(i) (Supp. III 1997).

115. *AT&T*, 525 U.S. at 396.

116. *Id.*

117. *Id.* (citing 47 C.F.R. § 51.809(b)).

118. *See id.* (citing 47 C.F.R. § 51.809(c)).

119. *Id.*

120. *Id.* at 385 n.10.

121. *Id.* at 378.

*C. Reciprocal Compensation for Termination of Internet
Service Provider Traffic*

Another area in which issues have arisen regarding the scope of federal and state jurisdiction concerns reciprocal compensation for telecommunications traffic that originates on an ILEC's network and is delivered to an Internet Service Provider¹²² ("ISP").¹²³ Section 251(b)(5) of the Act provides that each LEC has "[t]he duty to establish reciprocal compensation arrangements for the transport and termination of traffic."¹²⁴ Section 252(d)(2)(A) provides in relevant part:

For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) of this title, a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless –

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier.¹²⁵

The FCC has determined that for the purposes of § 251(b)(5), a carrier is entitled to reciprocal compensation only for traffic that "originates and terminates within a local area . . . We disagree with [the] contention that § 251(b)(5) entitles an [interexchange carrier ("IXC")] to receive reciprocal compensation from a LEC when a long-distance call is passed from the LEC serving the caller to the IXC."¹²⁶

However, the proper classification of ISP traffic has been the subject of debate, and problems have arisen where CLECs demand reciprocal compensation from ILECs for calls delivered to the CLECs' ISP customers. According to the FCC:

Generally speaking, when a call is completed by two (or more) interconnecting carriers, the carriers are compensated for carrying that traffic through either reciprocal compensation or access charges. When two carriers jointly provide interstate access (e.g., by delivering a call to

122. An Internet Service Provider sometimes is referred to as an Information Service Provider. ISPs "are companies which offer their customers connections to the Internet through the telephone network." *Illinois Bell Tel. Co. v. Worldcom Techs., Inc.*, 179 F.3d 566, 569 (7th Cir. 1999).

123. *See id.* at 568 ("Through the Telecommunications Act of 1996 Congress has opened the door to competing local exchange carriers and has inserted both the Federal Communications Commission (FCC) and the federal courts into the previously state-regulated monopoly. Just how far into the scheme does the federal presence reach? is the \$64,000 question.").

124. 47 U.S.C. § 251(b)(5) (Supp. III 1997).

125. *Id.* § 252(d)(2)(A).

126. First Report & Order, *supra* note 4, ¶ 1034.

an interexchange carrier (IXC)), the carriers will share access revenues received from the interstate service provider. Conversely, when two carriers collaborate to complete a local call, the originating carrier is compensated by its end user and the terminating carrier is entitled to reciprocal compensation pursuant to section 251(b)(5) of the Act. Until now, however, it has been unclear whether or how the access charge regime or reciprocal compensation applies when two interconnecting carriers deliver traffic to an ISP.¹²⁷

The lack of clarity is due to the nature of ISP traffic. For example, as the customer of a competing carrier, the ISP is generally assigned a local telephone number, and the originating caller (the person establishing the Internet connection) is billed for a local call.¹²⁸ However, the originating caller's ultimate connection though, is not to the ISP but rather a distant website.¹²⁹ As stated above, § 251(b)(5) requires the provision of reciprocal compensation for calls "originating and terminating within a local area."¹³⁰ ILECs have therefore argued that because ISP traffic is destined for a distant website, ISP traffic is interstate in nature, or at the very least constitutes a mixture of intrastate and interstate traffic, and thus, is not subject to the reciprocal compensation provisions of the Act. CLECs have made the opposite argument, that is, that ISP traffic actually terminates at the ISP's local server, and thus, reciprocal compensation is due.¹³¹

The issue has been litigated in Indiana in proceedings before the Indiana Utility Regulatory Commission ("IURC"),¹³² as well as before several state commissions throughout the country which have largely concluded that traffic delivered to ISPs is local traffic subject to reciprocal compensation.¹³³ In the

127. *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Inter-Carrier Compensation for ISP-Bound Traffic*, 14 F.C.C.R. 3689, ¶ 9 (released Feb. 26, 1999) [hereinafter ISP Order].

128. *See Illinois Bell*, 179 F.3d at 569.

129. *See id.*

130. 42 U.S.C. § 251(b)(5) (Supp. III 1997).

131. *See* ISP Order, *supra* note 127, ¶ 12.

132. *See, e.g., In re Complaint of Time Warner Communications of Indiana, L.P. against Indiana Bell Telephone Company, Incorporated, d/b/a Ameritech Indiana, for Violation of the Terms of the Interconnections Agreement, No. 41097* [hereinafter Time Warner Complaint]. In the discussion below, three separate orders by the IURC in Cause No. 41097 are referenced as follows: (Ind. U.R.C. Sept. 16, 1998), (Ind. U.R.C. Feb. 3, 1999), and (Ind. U.R.C. June 9, 1999).

133. *See* Time Warner Complaint, *supra* note 132, (Ind. U.R.C. Feb. 3, 1999). Specifically, the IURC took administrative notice of state commission decisions from Arizona, Connecticut, Delaware, Florida, Georgia, Illinois, Maryland, Michigan, Minnesota, Missouri, New York, North Carolina, Oklahoma, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Virginia, Washington, and Wisconsin. *See id.* at 8. In *Illinois Bell v. Worldcom Technologies, Inc.*, 157 F.3d 500 (7th Cir. 1998), the court ran the statistics on the reciprocal compensation for ISP traffic litigation finding 21 state commissions deciding that reciprocal compensation was due and three district courts and one state court enforcing the administrative decisions making "the score at the moment . . . 25-0

proceedings before the IURC, Time Warner charged Ameritech Indiana with breach of the terms of its interconnection agreement for failing to provide reciprocal compensation to Time Warner for traffic terminated by Time Warner's ISP customers.¹³⁴

During these proceedings, the FCC also reviewed issues concerning reciprocal compensation for ISP traffic.¹³⁵ Although the IURC acknowledged the concurrent proceedings before the FCC, the IURC found

that any decision by the FCC regarding the manner in which ISPs might be regulated if they are to be treated as telephone companies will not resolve Time Warner's allegation of a breach of contract of the interconnection agreement. Nor will any decision by the FCC regarding the jurisdictional nature of ISP traffic on a going forward basis bind the [IURC's] determination of the parties' intention of how ISP traffic should be treated at the time the [i]nterconnection [a]greement was executed.¹³⁶

Further, the IURC concluded that the Act "specifically charges the state with the responsibility of enforcing the provisions of interconnection agreements,"¹³⁷ and that the terms of the interconnection agreement itself expressly authorize the IURC to resolve disputes between the parties.¹³⁸

Ameritech Indiana argued that the FCC has recognized ISP traffic to be exchange access traffic, and has exempted ISPs from paying access charges. Thus ISP traffic is exchange access traffic rather than local traffic, because if ISP traffic were local traffic, no exemption from access charges would be necessary.¹³⁹ The IURC rejected this argument and determined that the evidence, the terms of the interconnection agreement, and the applicable precedent existing at the time the interconnection agreement was executed, demonstrated the parties' intent that ISP traffic would be treated as local traffic.¹⁴⁰

The IURC first looked to the express terms of the interconnection agreement, finding them to unambiguously indicate the parties' intention that traffic

against Ameritech and the other Baby Bells." *Id.* at 502.

134. See Time Warner Complaint, *supra* note 132 (Ind. U.R.C. Feb. 3, 1999).

135. See FCC Public Notice, Pleading Cycle Established for Comments on Request by ALTS for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic, 12 F.C.C.R. 9715 (released July 2, 1997). This Public Notice sought comments on whether information service traffic should be treated differently than local traffic for the purposes of reciprocal compensation provisions in existing interconnection agreements between ILECs and CLECs.

136. Time Warner Complaint, *supra* note 132, at 2 (Ind. U.R.C. Feb. 3, 1999).

137. *Id.* (citing *Iowa Utils. Bd.*, 120 F.3d at 804); see also *id.* at 8 (Ind. U.R.C. Sept. 16, 1998).

138. See *id.* at 2 (Ind. U.R.C. Feb. 3, 1999).

139. See *id.* at 8.

140. See *id.* at 10.

terminating at ISPs be treated as local traffic.¹⁴¹ The parties defined “Local Traffic” as “local service area calls *as defined by the Commission*,” and the IURC concluded that traffic delivered to ISPs constituted “local traffic” under its definition of “Local Service Area-Local Calling Area.”¹⁴² Traffic delivered to ISPs also was not included in the parties’ express exceptions to reciprocal compensation obligations set forth in the interconnection agreement.¹⁴³ The IURC further noted the fact that while the interconnection agreement expressly defined certain types of traffic, such as Feature Group A traffic,¹⁴⁴ it neither defined ISP traffic nor did it establish accounting methods that in any way differentiated ISP traffic from other traffic.¹⁴⁵ Finally, the IURC determined that treating traffic destined for ISPs as local traffic was consistent with the “unusual” “unanimous agreement” of other state commissions¹⁴⁶ and consistent with the FCC’s actions and proceedings regarding ISPs.¹⁴⁷

In February 1999, the FCC attempted to provide some guidance on the issue

141. *See id.* at 11.

142. *Id.* at 10-11 (emphasis added). The IURC’s definition of “Local Traffic” is taken from the definition of “Local Service Area-Local Calling Area—the area within which telephone service is furnished to customers under a specific schedule of exchange rates and without toll charges.” IND. ADMIN. CODE tit. 170, r. 7-1.1-2(21) (1996).

143. *See* Time Warner Complaint, *supra* note 132, at 11 (Ind. U.R.C. Feb. 3, 1999).

144. “Feature Group A” is an exchange access service and is a type of long distance call that is initiated by dialing a seven digit number. *Id.* at 8. The IURC rejected Ameritech Indiana’s argument that ISP traffic is analogous to Feature Group A noting that the Michigan and Illinois commissions have likewise rejected this argument. *See id.* (citing Brooks Fiber Communications v. Ameritech Mich., consolidated Case Nos. U-11178, U-11502, U-11522, U-11553 and Illinois Bell Tel. Co. v. Worldcom Techs. Inc., 1998 U.S. Dist. LEXIS 11394 (N.D. Ill. July 21, 1998) (affirming the Illinois Commerce Commission’s rejection of Ameritech’s contention that ISP traffic is essentially the same as Feature Group A traffic)).

145. *See id.* The IURC also pointed to other factors outside the interconnection agreement’s “four corners” supporting its conclusion that ISP traffic is local traffic:

Ameritech’s own treatment of ISP traffic is revealing. For instance, Ameritech treats traffic to its own ISP customers as local for purposes of booking revenues, separations, and ARMIS reporting, despite its argument that in this case, such traffic is exchange access [traffic]. Ameritech’s end users who make calls to an ISP served by Ameritech within Ameritech’s local calling area are not assessed toll charges, and such calls are treated by Ameritech as local calls.

Id. at 11.

146. *Id.* at 12.

147. *See id.* Specifically, the IURC noted that “[t]he FCC has indicated that it does not intend to answer the question of whether ISP calls are local calls within the Interconnection Agreements already executed and with which the state commissions are charged with enforcement” and that “the FCC agrees with the [IURC] that the proper construction of an existing interconnection agreement does not turn on any subsequent decision of the FCC.” *Id.* (citing *Response of FCC as Amicus Curiae to Motion for Referral of Issues* in BellSouth Telecomms., Inc. v. US LEC, Civil Action No. 3:98-CV170-MU (W.D.N.C.)).

of reciprocal compensation for ISP traffic by issuing a declaratory ruling and Notice of Proposed Rulemaking.¹⁴⁸ The FCC began by discussing the nature of ISP traffic, upholding its prior precedent that the jurisdictional nature of telecommunications traffic (i.e. whether it is interstate or intrastate) is determined by considering the communications from inception to completion regardless of intermediate facilities.¹⁴⁹ Accordingly, the FCC agreed with arguments advanced by ILECs "that the communications at issue here do not terminate at the ISP's local server, as CLECs and ISPs contend, but continue to the ultimate destination or destinations, specifically at a Internet website that is often located in another state."¹⁵⁰

The FCC then turned to the question of whether an Internet call constitutes interstate telecommunications.¹⁵¹ Generally, a call that originates and terminates within a state is jurisdictionally intrastate, and a call that originates in one state and terminates in a different state is jurisdictionally interstate.¹⁵² The analysis concerning Internet communications does not fit within this simple construct, and the FCC ultimately determined that ISP traffic is largely interstate in nature:

An Internet communication does not necessarily have a point of "termination" in the traditional sense. An Internet user typically communicates with more than one destination point during a single Internet call, or "session," and may do so either sequentially or simultaneously. In a single Internet communication, an Internet user may, for example, access websites that reside on servers in various states or foreign countries, communicate directly with another Internet user, or chat on-line with a group of Internet users located in the same local exchange or in another country. Further complicating the matter of identifying the geographical destinations of Internet traffic is that the contents of popular websites increasingly are being stored in multiple servers throughout the Internet, based on "caching" or website "mirroring" techniques. After reviewing the record, *we conclude that, although some Internet traffic is intrastate, a substantial portion of Internet traffic involves accessing interstate or foreign websites.*¹⁵³

148. See ISP Order, *supra* note 127.

149. See *id.* ¶ 11 (quoting *Teleconnect Co. v. Bell Tel. Co.*, 10 F.C.C.R. 1626, 1629, *aff'd sub nom.* *Southwestern Bell Tel. Co. v. FCC*, 116 F.3d 593 (D.C. Cir. 1997)). "[T]he [FCC] traditionally has determined the jurisdictional nature of communications by the end points of the communication and consistently has rejected attempts to divide communications at any intermediate points of switching or exchanges between carriers." *Id.* ¶ 10. Thus, the FCC "has jurisdiction over, and regulates charges for, the local network when it is used in conjunction with the origination and termination of interstate calls." *Id.* ¶ 12 (quoting *Petition for Emergency Relief and Declaratory Ruling* filed by BellSouth Corporation, 7 F.C.C.R. 1619, 1621 (1992)).

150. *Id.* ¶ 12 (footnote omitted).

151. See *id.* ¶ 18.

152. See *id.*

153. *Id.* (emphasis added) (footnotes omitted).

Moreover, it is important to point out that, consistent with Ameritech Indiana's argument in the Time Warner Complaint, the FCC recognizes that ISPs provide exchange access, but exempts ISPs from paying access charges.¹⁵⁴ In the ISP Order, the FCC stated:

That the Commission *exempted* ESPs from access charges indicates its understanding that ESPs in fact use interstate access service; otherwise, *the exemption would not be necessary*. We emphasize that the Commission's decision to treat ISPs as end users for access charge purposes and, hence, to treat ISP-bound traffic as local, does not affect the Commission's ability to exercise jurisdiction over such traffic.¹⁵⁵

* * *

CLECs also argue that the traffic they deliver to ISPs must be deemed either "telephone exchange service" or "exchange access." They contend that ISP traffic cannot be "exchange access," because neither LECs nor CLECs assess toll charges for the service. CLEC delivery of ISP traffic is, therefore, according to CLECs, "telephone exchange service," a form of local telecommunications for which reciprocal compensation is due. . . . [T]he [FCC] consistently has characterized ESPs as "users of access service" but has treated them as end users for pricing purposes. Thus, we are unpersuaded by this argument.¹⁵⁶

The FCC also concluded that its determination that ISP traffic is largely interstate did *not* alter the current access charge exemptions for ISPs.¹⁵⁷

Although the FCC essentially agreed with ILECs that Internet traffic was substantially interstate in nature and subject to the FCC's jurisdiction, this determination did not resolve existing reciprocal compensation issues. Because there is no rule governing interstate compensation mechanisms, the ISP Order sought comment on the implementation of such a rule.¹⁵⁸ In the interim, the FCC found "no reason to interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-

154. See *id.* ¶ 16.

155. *Id.* (emphasis added) (footnotes omitted).

156. *Id.* ¶ 17 (footnotes omitted).

157. See *id.* ¶ 20. While the FCC's explanation seemingly would have supported Ameritech Indiana's access charge exemption arguments in the Time Warner Complaint proceedings, the FCC made clear that its determinations would not be dispositive of interconnection disputes before state commissions. See *id.* Further, as discussed below, despite the FCC's position in the ISP Order, the Seventh Circuit was not persuaded by Ameritech Illinois' access charge exemption argument. Following the FCC's issuance of the ISP Order, Ameritech Indiana did indeed file a Petition for Rehearing and Reconsideration, which was denied by the IURC. See generally Time Warner Complaint (Ind. U.R.C. June 9, 1999).

158. See ISP Order, *supra* note 127, ¶ 22.

bound traffic”¹⁵⁹ because parties voluntarily entering into interconnection agreements could have reasonably agreed to treat ISP traffic as local traffic so that reciprocal compensation obligations would apply.¹⁶⁰ Furthermore, the FCC determined that where parties have not voluntarily agreed on reciprocal compensation for ISP traffic, “state commissions nonetheless may determine in their arbitration proceedings at this point that reciprocal compensation should be paid for this traffic.”¹⁶¹ According to the FCC, under the arbitration provisions of § 252, state commissions have authority over both interstate and intrastate matters,¹⁶² and thus, “the mere fact that ISP-bound traffic is largely interstate does not necessarily remove it from the § 251/252 arbitration process.”¹⁶³

Subsequently, the Seventh Circuit upheld a district court ruling upholding an order by the Illinois Commerce Commission (ICC) that under specific interconnection agreements, parties reasonably agreed that reciprocal compensation would apply to traffic billed as local traffic, including traffic to ISPs.¹⁶⁴ The court clarified that its duty

is to examine the ICC order, not to determine whether the ICC correctly applied principles of state contract law, but to see whether its decision violates federal law, as set out in the Act or in the FCC’s interpretation.

The short answer is that it does not. The FCC could not have made clearer that in the absence of a rule, a state agency’s interpretation of an agreement so as to require payment of reciprocal compensation does not necessarily violate federal law.¹⁶⁵

Ameritech Illinois argued that the Act does not require the payment of reciprocal compensation,¹⁶⁶ and that the interconnection agreements at issue “were negotiated against a backdrop of longstanding FCC policy that ISP traffic is not local traffic” and thus, the parties did not intend for reciprocal compensation to apply to ISP traffic.¹⁶⁷ Rejecting these arguments, the court cited several factors set forth in the ISP Order which the state commissions could consider in determining whether the parties intended for reciprocal compensation to apply to ISP traffic and “conclud[ed] that the factors are illustrative only and that *the state commissions, not the FCC*, are the arbiters of what factors are relevant in the determination.”¹⁶⁸ Furthermore, the court pointed out the FCC’s finding that interconnection agreements negotiated prior to the ISP Order

159. *Id.* ¶ 21.

160. *See id.* ¶ 24.

161. ISP Order, *supra* note 127, ¶ 25.

162. *See id.* (citing First Report & Order, 11 F.C.C.R. at 15544, 15547).

163. *Id.* ¶ 25.

164. *See Illinois Bell Tel. Co. v. Worldcom Techs., Inc.*, 179 F.3d 566, 572 (7th Cir. 1999).

165. *Id.*

166. *See id.* at 573.

167. *Id.*

168. *Id.* (citing ISP Order, *supra* note 127, ¶ 24) (emphasis added).

(including those at issue in *Illinois Bell*) “were negotiated in the ‘context of this Commission’s longstanding policy of treating this traffic as *local*, and the conduct of the parties pursuant to those agreements.’”¹⁶⁹ The court also concluded that the ICC reasonably considered relevant factors such as the fact that: calls to ISPs are billed as local calls; customers dial local numbers to reach ISPs; and calls to ISPs are routed over local, rather than long-distance lines.¹⁷⁰ Finally, the court pointed out that the interconnection agreements at issue “specifically granted to the ICC the right to define local traffic for reciprocal compensation purposes.”¹⁷¹

In *Bell Atlantic Telephone Co. v. FCC*,¹⁷² the D.C. Circuit found the FCC’s determinations in the ISP Order insufficient. Specifically, the court found that the FCC did not satisfactorily explain why dial-up calls to Internet service providers (ISPs) are more like local “exchange access” calls rather than “telephone exchange” traffic.¹⁷³ Accordingly, the D.C. Circuit vacated and remanded the ISP Order to the FCC.

II. UNIVERSAL SERVICE

A. Background of Universal Service

Section 254 requires the FCC and state commissions to establish support mechanisms and take actions to uphold the principles of Universal Service.¹⁷⁴

169. *Id.* (citing ISP Order, *supra* note 127, ¶ 24) (emphasis added). The court rejected Ameritech Illinois’ citations to prior statements and actions made by the FCC that could be construed as a determination that ISP traffic is interstate traffic. *See id.* at 573-74. For example, Ameritech Illinois pointed out that ISPs are exempted from paying access charges for connections to distant websites; if ISP traffic did not contribute interstate traffic, there would be no need for such exception. *See id.* Ameritech Illinois also relied upon the decisions in *In re GTE Telephone Operating Cos.*, 13 F.C.C.R. 22,466 (1998) and *In re Bell Atlantic, Telephone Cos., Bell Atlantic Tariff No. 1, Bell Atlantic Transmittal No. 1076*, 13 F.C.C.R. 23,667 (1998) for the proposition that ISP traffic terminates on the Internet rather than on the local server. *See Illinois Bell Tel. Co.*, 179 F.3d at 573. Without addressing Ameritech Illinois’ access charge exemption argument, the court noted that both the *Bell Atlantic* and *GTE* decisions were entered after the interconnection agreements at issue were negotiated, and thus, the FCC’s statements contained therein could not have affected the parties’ intentions. Moreover, the court quoted the FCC’s statement in *GTE* that:

This Order does not consider or address issues regarding whether local exchange carriers are entitled to receive reciprocal compensation when they deliver to information service providers, including Internet service providers, circuit-switched dial-up traffic originated by interconnecting LECs.

Id. at 574 (citation omitted).

170. *See id.*

171. *Id.*

172. 206 F.3d 1 (D.C. Cir. 2000).

173. *Id.* at 8.

174. 47 U.S.C. § 254(b) provides:

Prior to the Act, "Universal Service" meant providing "plain old telephone service" or "POTS" (i.e. basic dial-tone service) at rates made affordable by cross-subsidization through implicit subsidies from monopolized services.¹⁷⁵ However, the Act recognizes that with advancements in technology, "universal service" now constitutes more than POTS. Moreover, the Act contemplates that universal service be funded by explicit funding mechanisms¹⁷⁶ because implicit subsidies cannot be maintained in a competitive environment.¹⁷⁷

Universal Service Principles.—The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles:

(1) **Quality and Rates.**—Quality services should be available at just, reasonable, and affordable rates.

(2) **Access to advanced services.**—Access to advanced telecommunications and information services should be provided in all regions of the Nation.

(3) **Access in rural and high cost areas.**—Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

(4) **Equitable and nondiscriminatory contributions.**—All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.

(5) **Specific and predictable support mechanisms.**—There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.

(6) **Access to advanced telecommunications services for schools, health care, and libraries.**—Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection (h).

(7) **Additional principles.**—Such other principles as the Joint Board and Commission determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this Act.

47 U.S.C. § 254(b) (Supp. III 1997).

175. Cross-subsidization through implicit subsidies refers to the ability of a monopoly to artificially increase prices of services that are relatively low-cost to subsidize the prices of services that are relatively high-cost.

176. See 47 U.S.C §§ 254(e), (f).

177. See THOMAS G. KRATTENMAKER, *TELECOMMUNICATIONS LAW AND POLICY* 464 (2d ed. 1998).

The basic goal of section 254 is to establish rules and procedures for the reform of universal service in a competitive market, while allowing for periodic evaluations of the concept, evaluations that consider "advances in telecommunications and information technologies and services." Section 254 also appears to require that, in the future, favored services be supported by direct and apparent taxes, not by implicit subsidies hidden inside pricing schemes. Beneficiaries of universal service support are to include low income consumers and those who reside in rural, insular, and high cost areas, as well as schools, libraries, and health care providers.¹⁷⁸

During the survey period, the FCC and the Federal-State Joint Board on Universal Service ("Joint Board") have been hard at work at the monumental task of implementing universal service in accordance with the Act.¹⁷⁹

B. Federal Universal Service Proceedings

The FCC initiated a proceeding in CC Docket No. 96-45 to receive the Joint Board's recommendations and to promulgate rules implementing the Act's universal service provisions.¹⁸⁰ Since the FCC's issuance of its First Report and Order in the Universal Service Docket in 1997,¹⁸¹ the FCC has issued several subsequent Reports and Orders and Orders on Reconsideration in an effort to implement the provisions of § 254.¹⁸²

178. *Id.* (footnote omitted).

179. The Federal-State Joint Board on Universal Service is an entity created pursuant to § 254(a)(1) to make recommendations to the FCC concerning the implementation of universal service. *See* 47 U.S.C. § 254(a)(1).

180. *See id.* § 254(a)(2).

181. *See In re* Federal-State Joint Board on Universal Service, 12 F.C.C.R. 8776 (Released May 8, 1997) [hereinafter *Universal Service First Report & Order*].

182. In addition to the Local Competition and Universal Service Dockets, the FCC has included *In re* Access Charge Reform, CC Docket 96-262 to the "trilogy of actions collectively intended to foster and accelerate the introduction of competition into all telecommunications markets, pursuant to the mandate of the Act." *In re* Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, and End User Common Line Charges, 12 F.C.C.R. 15,982, ¶ 1, (Released May 16, 1997) [hereinafter *Access Reform First Report and Order*]. Specifically, the Access Charge Reform Docket addresses "Congress's command to create secure and explicit mechanisms to achieve universal service goals, [and the FCC's conclusion] that implicit subsidies embodied in the existing system of interstate access charges cannot be indefinitely maintained in their current form." *Id.* ¶ 35. Similar to the First Report and Order and the Universal Service First Report and Order discussed below, several portions of the Access Reform First Report and Order were challenged. These challenges were consolidated in the Eighth Circuit Court of Appeals, which deferred to the FCC's determinations and upheld the Access Reform First Report and Order. *See Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998).

A significant decision within the survey period concerning the Universal Service First Report and Order came from the Fifth Circuit Court of Appeals in *Texas Office of Public Utility Counsel v. FCC*.¹⁸³ *Texas Office* was the consolidated challenge by several parties to certain provisions of the FCC's Universal Service First Report and Order and concerned two primary sets of challenges. The first set of challenges concerned "the FCC's plan for replacing the current mixture of explicit and implicit subsidies with an explicit universal service support system for high-cost areas."¹⁸⁴ The second set concerned "the FCC's proposal for implementing § 254(h) programs supporting schools, libraries, and health care providers."¹⁸⁵ Although the court upheld most of the challenged provisions of the Universal Service First Report and Order, some FCC determinations were reversed.

1. *"No Disconnect" Rule.*—Bell Atlantic and various states challenged the FCC's rule that bars "carriers receiving universal service support from disconnecting Lifeline services from low-income consumers who have failed to pay toll charges"¹⁸⁶ on the grounds that the FCC exceeded its jurisdictional authority under § 2(b), which proscribes FCC regulation of intrastate telecommunications service.¹⁸⁷ The FCC's response was based on three separate arguments, each of which the court rejected.

First, the FCC argued that § 254(b)(3) granted it unambiguous authority to adopt policies based on the principle that low income consumers should have access to telecommunications and information services.¹⁸⁸ The court held that "§ 254(b) identifies seven principles the FCC should consider in developing its policies; it hardly constitutes a series of specific statutory commands," and noted that the court had refused to use the same "aspirational language" in § 254(b) to require the FCC to adopt certain universal service support cost methodologies.¹⁸⁹

Next, the FCC argued that the "no disconnect" rule did not attempt to regulate intrastate service, "but merely prevent[ed] the disconnection of interstate service (and, as a consequence, of intrastate service) for failure to pay toll charges."¹⁹⁰ Finding that the "no disconnect" rule was indeed a regulation

183. 183 F.3d 393 (5th Cir. 1999), *cert. denied*, 120 S. Ct. 2212; 120 S. Ct. 2237, and *cert. granted sub nom.* GTE Serv. Corp. v. FCC, 120 S. Ct. 2214 (2000).

184. *Id.* at 408.

185. *Id.* at 408-09.

186. *Id.* at 421 (citing 47 C.F.R. § 54.401(b) (1999)).

187. See *Texas Office*, 183 F.3d at 421 (footnote omitted) (citing Universal Service First Report & Order, *supra* note 181, ¶ 390). "Lifeline" is a program that provides telecommunications services to qualifying low-income customers. "Lifeline" services include "single-party service; voice-grade access to the public switched network; [dual tone multifrequency] DTMF or its functional digital equivalent; access to emergency services; access to operator services; access to interexchange service; access to directory assistance; and toll-limitation services . . ." Universal Service First Report & Order, *supra* note 181, ¶ 384.

188. See *Texas Office*, 183 F.3d at 421 (citing 47 U.S.C. § 254(b)(3) (Supp. III 1997)).

189. *Id.*

190. *Id.* (footnote omitted).

proscribed by § 2(b), as “it dictates the circumstances under which local service must be maintained,”¹⁹¹ the court rejected the FCC’s argument that even if the rule was a regulation, it should be upheld under the “impossibility exception,” whereby the FCC has jurisdiction to regulate in instances where interstate service cannot be separated from intrastate service.¹⁹² Analyzing the FCC’s “impossibility exception” argument pursuant to the framework set forth in *Maryland Public Service Commission v. FCC*,¹⁹³ the court found that the FCC’s argument “failed to show why allowing the states to control disconnections from local service would ‘negate the exercise of the FCC’s lawful authority’”¹⁹⁴

Finally, relying on the Supreme Court’s decision in *AT&T v. Iowa Utilities Board*, the FCC argued that it is authorized to implement the “no disconnect” rule because § 201(b) confers “jurisdiction over all areas, including intrastate matters, to which the Act applies” including § 254.¹⁹⁵ The court found, however, that pursuant to the Supreme Court’s reconciliation of its decision in *Louisiana PSC*¹⁹⁶ with its jurisdictional holding in *AT&T v. Iowa Utilities Board*,¹⁹⁷ the question was not whether § 254 merely “applies” to intrastate matters, but whether § 254 “does indeed ‘apply’ to intrastate matters in a sufficiently ‘unambiguous’ manner” to override the jurisdictional proscription in § 2(b).¹⁹⁸ The court answered the question in the negative, rejecting the FCC’s arguments that the language in §§ 254(b)(3), (c), and (j) unambiguously applied to intrastate service.¹⁹⁹ The court found that § 254(d), which directs interstate carriers to contribute to the FCC’s funding mechanism, and § 254(f), which directs intrastate carriers to contribute to individual states’ universal service funds

191. *Id.* at 422.

192. *Id.* (“FCC has jurisdiction to prescribe the conditions under which terminal equipment may be interconnected with the interstate telephone line network.” (citing *North Carolina Utils. Comm’n v. FCC*, 552 F.2d 1036, 1048 (4th Cir. 1977))).

193. 909 F.2d 1510, 1515 (D.C. Cir. 1990). This framework involves a three part test to determine whether the FCC may appropriately intervene in local service issues:

To permit the FCC to preempt state regulation of whether to cut off low-income subscribers, the [D.C.] circuit requires the agency to show that “(1) the matter to be regulated has both interstate and intrastate aspects; (2) FCC preemption is necessary to protect a valid federal regulatory objective; and (3) state regulation would negate the exercise by the FCC of its own lawful authority because regulation of the interstate aspects of the matter cannot be unbundled from regulation of intrastate aspects.”

Texas Office, 183 F.3d at 422 (quoting *Maryland PSC*, 909 F.2d at 1515).

194. *Id.*

195. *Id.* at 423.

196. 476 U.S. 355 (1986).

197. 525 U.S. 366 (1999).

198. *Id.* The Fifth Circuit found that *AT&T v. Iowa Utilities Board* provides little guidance to answer this question, except to find that the Act has “unquestionably” “taken the regulation of local telecommunications competition away from the States.” See *Texas Office*, 183 F.3d at 424. Nevertheless, the Fifth Circuit noted that the Supreme Court fails to explain why. See *id.*

199. See *id.*

contemplate a "dual regulatory structure" distinguishable from the statutory schemes contained in §§ 251 and 252 that solely concern intrastate issues.²⁰⁰

2. *Recovery of Universal Service Contributions Through Access Charges.*—Another dispute decided against the FCC concerned the FCC's interpretation of the term "explicit" in its rules requiring ILECs to recover universal service contributions through access charges.²⁰¹ Specifically, GTE argued that the FCC's rules "unfairly disadvantage[] ILECs because, unlike their potential new competitors, they cannot recover their universal service contributions through explicit charges on their end users, but, instead, are required by the FCC to increase their access charges on long-distance service providers."²⁰² Although GTE may not necessarily be disadvantaged in the amounts actually recovered, the recovery method would put GTE at a competitive disadvantage because the customers of competitive carriers would see the cost of universal service explicitly itemized on his bill, and the ILEC customer will pay for the cost of universal service through higher rates.²⁰³ According to the FCC's interpretation, the recovery method "'satisfies the statutory requirement that support be explicit' by requiring each carrier to contribute a specific percentage of its end user revenues."²⁰⁴ The court found "explicit" to mean the opposite of "implicit," and that requiring ILECs to recover universal service contributions from access charges maintained an implicit subsidy.²⁰⁵ This violated the express statutory mandate of § 254(e).²⁰⁶ The court therefore reversed this FCC rule.²⁰⁷

3. *Contribution of Interstate Carriers on the Basis of International Revenues.*—The court also reversed the FCC's decision to include international revenues of interstate carriers in the universal service base.²⁰⁸ Under the FCC's scheme, universal service contributions by "small interstate carriers specializing in providing international telephone service"²⁰⁹ would exceed the interstate revenues of those carriers, and would therefore violate the "equitable and

200. *Id.*

201. *Id.* at 424-25. 47 U.S.C § 254(e) (Supp. III 1997) provides:

UNIVERSAL SERVICE SUPPORT.—After the date on which Commission regulations implementing this action take effect, only an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive specific Federal universal service support. A carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. *Any such support should be explicit and sufficient to achieve the purposes of this section.*

Id. (emphasis added).

202. *Texas Office*, 183 F.3d at 425.

203. *See id.*

204. *Id.* (quoting Universal Service First Report & Order, *supra* note 181, ¶ 854).

205. *See id.*

206. *See id.*

207. *See id.*

208. *See id.* at 435.

209. *Id.* at 433.

nondiscriminatory” provisions of § 254(d).²¹⁰ The court held that the FCC’s discretion to “balance the competing concerns set forth in section 254(b), which include the need for sufficient revenues to support universal service,” did not reasonably justify the inequitable and discriminatory result.²¹¹

4. *Authority to Assess Contributions on Intrastate Revenues.*—Similar to the “no disconnect” rule, the FCC’s practice of assessing universal service contributions based upon both interstate and intrastate rules was challenged on the ground that the FCC exceeded its jurisdiction by regulating intrastate service in violation of the proscription in § 2(b).²¹²

The FCC first argued that its practice merely factored intrastate revenue into universal service contributions and that, in any event, carriers could only recover universal service contributions from interstate rates.²¹³ Thus, the FCC’s practice did not constitute a regulation within the proscription set forth in § 2(b) or the rule in *Louisiana PSC*.²¹⁴ However, looking to the express language of § 2(b),²¹⁵ the court rejected the FCC’s argument and held that “the inclusion of intrastate revenues in the calculation of universal service contributions easily constitutes a ‘charge . . . in connection with intrastate communications service.’”²¹⁶

The FCC then contended that § 254 did in fact unambiguously apply to intrastate matters.²¹⁷ Specifically, the FCC cited the language of § 254(d) concerning interstate carrier universal service contributions²¹⁸ and the language set forth in § 254(f) requiring that state adopted universal service mechanisms not “rely on or burden Federal universal service support mechanisms,”²¹⁹ and argued that a comparison of the statutory provisions evidences Congress’ intent that the FCC “bear the primary responsibility for ensuring the sufficiency of universal service for both interstate and intrastate universal service.”²²⁰ The court found that the language in §§ 254(d) and (f) did not constitute an unambiguous grant of authority sufficient to withstand the proscription in § 2(b).²²¹

210. *Id.* Section 254(d) provides in relevant part that “[e]very telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and non-discriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service.” 47 U.S.C. § 254(d) (Supp. III 1997).

211. *Texas Office*, 183 F.3d at 434.

212. *See id.* at 446-47.

213. *See id.* at 447.

214. *See id.*

215. *See* 47 U.S.C. § 152(b) (1994).

216. *Texas Office*, 183 F.3d at 447 (quoting § 2(b)).

217. *See id.*

218. *See id.*

219. *Id.*

220. *Id.*

221. *See id.* In declining to defer to the FCC on this issue, the court compared its analysis under § 2(b) and *Louisiana PSC* to the traditional analysis under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

While under *Chevron* step-two, we usually give the agency deference in its

On October 8, 1999, the FCC released its response to *Texas Office*,²²² and implemented the following revisions to its rules regarding universal service:

* Incumbent LECs may recover their universal service contributions through interstate access charges or through interstate end-user charges. To the extent an incumbent LEC is currently recovering its universal service contributions through interstate access charges, and chooses to recover its contribution through an interstate end-user charge, it must make a corresponding reduction in its interstate access charges to avoid any double recovery.

* Contributions to the FCC's universal service program will be assessed on providers of interstate telecommunications services using a single contribution factor based on providers' interstate and international end-user telecommunications revenues. As directed by the court, the FCC removed intrastate end-user telecommunications revenues from the assessment base for the schools and libraries and rural health care support mechanisms.

* Consistent with the court's decision, the FCC is no longer able to prohibit local telephone companies that are eligible for universal service support from disconnecting Lifeline service to consumers that fail to pay toll charges.

* In response to the court's remand of this issue, providers of interstate telecommunications service whose interstate end-user telecommunications revenues account for less than 8 percent of their combined interstate and international end-user telecommunications revenues are not required to contribute on the basis of their international revenues. These providers are still required to contribute on the basis of their interstate end-user telecommunications revenues.²²³

C. State Universal Service Proceedings

In Indiana, universal service has been the subject of an ongoing and active

interpretation of ambiguous statutory language, the Supreme Court continues to require the agency to overcome the § 2(b) statutory presumption with unambiguous language showing that the statute applies to intrastate matters.

Texas Office, 183 F.3d at 447.

222. See Universal Service First Report and Order, *supra* note 181; Access Reform First Report and Order, *supra* note 182; Sixteenth Order on Reconsideration in CC Docket No. 96-45, Eighth Report and Order 96-45, Sixth Report and Order, 96-262, *In re* Federal-State Joint Board on Universal Service, 15 F.C.C.R. 1679 (released Oct. 8, 1999).

223. *FCC Implements Court's Decision on Universal Service*, Report No. 99-46, 1999 FCC LEXIS 5021, at *3-4 (Oct. 8, 1999).

proceeding before the IURC.²²⁴ Within the survey period, the IURC issued several orders²²⁵ concerning universal service and access charge reform. The following is a brief discussion of three major orders in the universal service docket, also known as the “trilogy” of orders.²²⁶

1. *Comparability/Affordability Order*.—This Order examined the standards that the IURC should adopt to ensure that rates for services included in the FCC’s definition of universal service are consistent with the affordability principles set forth in § 254(b)(1)²²⁷ and § 254(i),²²⁸ and with the comparability principles set forth in § 254(b)(3).²²⁹ The following is a brief description of the IURC’s findings:

(a) Finding a formal adoption to be in the public interest, the IURC adopted each of the principles set forth in § 254(b),²³⁰ including the principle of “competitive neutrality,” which was adopted by the FCC as an additional universal service principle under the grant of authority contained in §

224. See *In re Matter of the Investigation on the Commission’s Own Motion Into Any and All Matters Relating to Access Charge Reform and Universal Service Reform, Including, But Not Limited to, High Cost or Universal Service Funding Mechanisms Relative to Telephone and Telecommunications Services Within the State of Indiana Pursuant to: I.C. 8-1-2-51, 58, 59, 69; 8-1-2.6 et seq. and Other Related Statutes, as well as the Federal Telecommunications Act of 1996* (47 U.S.C. Sec. 151, et seq.), No. 40785, 1999 WL 236854 (Ind. U.R.C. Feb. 1, 1999).

225. These orders include the “trilogy” of orders issued in Cause No. 40785: September 16, 1998 (“Comparability/Affordability Order”), October 28, 1998 (“Loop Allocation/254(k) Order”), and December 9, 1998 (“Access Reform Order”). Other orders issued in Cause No. 40785 in the survey period include: *In re Universal Service Reform*, No. 40785, 1999 WL 236854 (Ind. U.R.C. Feb. 1, 1999) (concerning the Transitional DEM Weighting Fund and Indiana High Cost Fund) and on December 29, 1998 (concerning the mirroring of interstate carrier access tariffs). See Sue E. Stemen, Esq., Ameritech Indiana, *Telecommunications Update—Indiana State Bar Association*, April 16, 1999.

226. Following the issuance of the “trilogy” of orders, the IURC initiated three subdockets to investigate Indiana’s three largest ILECs, Ameritech Indiana, GTE, and Sprint United, and their compliance with § 254(k) and the IURC’s orders issued in Cause No. 40785. See *In re Investigation on the Commission’s Own Motion into Any and All Matters to Access Charge Reform and Universal Service Reform*, No. 40785-S2, 2000 Ind. PUC LEXIS 78 (Ind. U.R.C. Jan. 26, 2000); *In re Investigation on the Commission’s Own Motion into Any and All Matters to Access Charge Reform and Universal Service Reform*, No. 40785-S3, 2000 Ind. PUC LEXIS 35 (Ind. U.R.C. Jan. 26, 2000); *In re Investigation on the Commission’s Own Motion into Any and All Matters to Access Charge Reform and Universal Service Reform*, No. 40785-S1, 1999 Ind. PUC LEXIS 59 (Ind. U.R.C. Apr. 7, 1999).

227. See 47 U.S.C. 254(b)(1) (1994).

228. Section 254 provides: “Consumer Protection.—The Commission and the States should ensure that universal service is available at rates that are just, reasonable, and affordable.” 47 U.S.C. § 254(i) (Supp. III 1997).

229. See *Comparability/Affordability Order*, *supra* note 225, at *1.

230. See 47 U.S.C. § 254(b).

254(b)(7).²³¹

(b) The IURC found that quality of service standards under § 254(b)(1),²³² applied to more than those services found by the FCC to be eligible for universal service support.²³³ The IURC stated that § 254(b)(1) establishes a policy that "applies to all states and to the following services: interexchange services; advanced telecommunications services; information services; and basic telephone services."²³⁴ The IURC justified the application of § 254(b)(1) to the additional services because "if Congress had intended section 254(b)(1) to apply only to the supported universal services, it would not have been necessary to include a separate protection for these services in § 254(i) of the Act."²³⁵ The IURC found that service quality standards found in 170 IAC 7-1.1-1 should apply to the provisioning of universal service,²³⁶ and noted that under current statutory provisions,²³⁷ the IURC retained the authority to monitor local providers' service quality.²³⁸

(c) The IURC then considered that standards to be adopted to ensure that the services and rates for universal service met the "comparability" standards set forth in § 254(b)(3).²³⁹ The IURC adopted a standard whereby "people in urban and rural or high cost areas or those with low incomes pay pretty much the same for services that are pretty much the same," and "[g]enerally available services at the price generally available in urban areas is the standard of comparison."²⁴⁰ Further, no single set of "reasonably comparable" rates should apply statewide for all providers, because allowing such could potentially "disincent competitive entry by other local service providers in both urban and non-urban areas and thus would be inconsistent with one of the prime tenets of TA 96."²⁴¹ The IURC determined that these standards should be considered "concurrently with a specific LEC's section 254 rate rebalancing as a measurement of the

231. Comparability/Affordability Order, *supra* note 225, at *10.

232. See 47 U.S.C. § 254(b).

233. These services include: "[v]oice grade access to the public switched network; local usage; dual tone multifrequency ('DTMF') signaling or its functional equivalent; access to emergency services; access to operator services; access to interexchange services; access to directory assistance; and toll limitation for qualifying low-income customers." Comparability/Affordability Order, *supra* note 225, at *10 (citing 47 C.F.R. § 54.101(a) (1998)).

234. *Id.*

235. *Id.*

236. See *id.* (citing IND. ADMIN. CODE tit. 170, r. 7-1.1-1 (1996)). The IURC did however note that its rules regarding service quality were more than 20 years old, and thus were probably inadequate given technological advances. See *id.* at *11. The IURC directed an agent to initiate an investigation of service quality with the goal of identifying necessary revisions to the service quality rules. See *id.*

237. See, e.g., IND. CODE §§ 8-1-2-58; 8-1-2-69 (1998).

238. See Comparability/Affordability Order, *supra* note 225, at *11.

239. *Id.* at *12.

240. *Id.*

241. *Id.*

reasonableness of any such proposal in the pricing of universal service.”²⁴²

(d) Finally, Regarding the appropriate standard(s) for “affordability” under §§ 254(b)(1) and 254(i), the IURC considered factors set forth in the Universal Service First Report and Order including “subscriberhip levels, in conjunction with rates for other services (such as local and toll) and certain non-rate factors” such as the size of calling scope, consumer income levels, cost of living, population density, and local variations in rate design.²⁴³ Citing the lack of competition in Indiana, the IURC was unable to set an absolute affordability level.²⁴⁴ Nevertheless, based in part on evidence concerning current service penetration levels, the IURC concluded that rates in Indiana *are* affordable.²⁴⁵ Regarding § 254(i), which specifically addresses services eligible for universal service support,²⁴⁶ the IURC defined the term “affordable” to mean

that the package of supported universal services should be available at a price that all consumers are able to pay, and that no individual consumer should bear a substantial burden in order to subscribe to the universal service package. An affordable rate, for the purposes of Section 254(i), must be defined from the perspective of the individual consumer and should not depend on the cost of providing universal service to that consumer.²⁴⁷

The IURC also concluded that affordability can also be accomplished through existing Lifeline and Link-Up programs targeted to low-income customers.²⁴⁸

2. *Loop Allocation/254(k) Order*.—On October 28, 1998, the IURC issued the second, and largest, in its “trilogy” of Orders²⁴⁹ in an effort to establish guidelines for carriers seeking to rebalance their rates to comport with the provisions of § 254(k).²⁵⁰ Although space constraints preclude an analysis and technical explanation of the IURC’s findings, the reader should know that the

242. *Id.* at *13.

243. *Id.* (citing Universal Service First Report & Order, *supra* note 181, ¶¶ 114-117).

244. *See id.*

245. *See id.* at *13.

246. *See* 47 U.S.C. § 254(i) (Supp. III 1997).

247. Comparability/Affordability Order, *supra* note 225, at *14 (citing Testimony filed on behalf of the Office of the Utility Consumer Counselor).

248. *See id.*

249. *See* Loop Allocation/254(k) Order, *supra* note 225.

250. Section 254(k) provides:

(k) *Subsidy of Competitive Services Prohibited*.—A telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition. The IURC, with respect to interstate services, and the States, with respect to intrastate services, shall establish any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services.

47 U.S.C. § 254(k).

Loop Allocation/254(k) Order contains findings concerning the following issues: the IURC's confiscation liability; the services to be included in the definition of universal service; the first sentence of § 254(k) prohibiting subsidization of non-competitive services by competitive services; and the second sentence of § 254(k) concerning cost allocation and joint and common costs.²⁵¹

3. *Access Reform Order*.—On December 9, 1998, the IURC issued the last in its "trilogy" of orders. In the Access Reform Order, the IURC sought to address issues concerning intrastate access charge reform for price cap non-rural ILECs "prior to implementing or approving company-specific "rate rebalancing" plans."²⁵²

The IURC also addressed a possible process for implementing intrastate access charges when and if mirroring of interstate access charges is discontinued, and addressed issues related to interexchange services and rates with regard to § 254(g)²⁵³ of the Act. Similar to the Loop Allocation/254(k) Order, an analysis of the IURC's findings requires a discussion of underlying technical issues that are beyond the scope of this article. However, the following is a very brief summary of the IURC's findings.

(a) The IURC adopted legal definitions concerning "telecommunications service" and "intrastate access," and determined that in the context of section 8-1-2-88.6(b) of the Indiana Code, "'interexchange carrier' is a provider of telecommunications services 'between exchanges,' and includes both interLATA and intraLATA carriers."²⁵⁴

(b) In order to comply with the objectives of § 254(g), e.g., that rates for interexchange services for rural or high-cost customers shall not be higher than the rates to customers in urban areas,²⁵⁵ the IURC found that "all Indiana retail intrastate interexchange toll rates are to be geographically averaged."²⁵⁶ However, the IURC recognized that the switched carrier access structure mirrored by some ILECs includes some geographic deaveraging, and allowed continued deaveraging of such provided that this practice does not cause a

251. See generally Loop Allocation/254(k) Order, *supra* note 225.

252. Access Reform Order, *supra* note 225, at 1-2.

253. Section 254(g) provides:

(g) Interexchange and Interstate Services.—Within 6 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall adopt rules to require that the rates charged by providers of interexchange telecommunications services to subscribers in rural and high cost areas shall be no higher than the rates charged by each such provider to its subscribers in urban areas. Such rules shall also require that a provider of interstate interexchange telecommunications services shall provide such services to its subscribers in each State at rates not higher than the rates charged to its subscribers in any other State.

47 U.S.C. § 254(g).

254. Access Reform Order, *supra* note 225, at 10.

255. See *id.*

256. *Id.*

violation of § 254(g).²⁵⁷

(c) Regarding mirroring, the IURC found that it would be appropriate “to mirror the *structure* of interstate access charges on an interstate basis, as that structure has been reformed by the FCC.”²⁵⁸ However, the IURC discontinued the practice of mirroring interstate access charge *rate levels*.²⁵⁹ Consistent with these findings, the IURC ordered Indiana ILECs “to mirror the structure, relationship between recurring and non-recurring charges, and the terms and conditions of interstate access services in the cost studies filed with the Commission as part of their company-specific rate-rebalancing cases.”²⁶⁰

(d) While citing the findings set forth in the Loop Allocation/254(k) Order, the IURC noted that intrastate access charges are now included within the category of services regulated by the IURC, but not included within the definition of universal service, and a company is free to allocate the joint and common costs of these services as it sees fit subject to IURC approval. Additionally, the IURC stated that a company can use any cost basis and methodology for cost studies presented to the IURC, so long as the same methodology is used for any confiscation claims.²⁶¹ Accordingly, the IURC rejected claims that access charge rates must be based on the cost of unbundled network elements using the TELRIC methodology.²⁶²

(e) Finally, regarding a requirement that IXC, ILEC toll providers, and other intrastate toll providers pass through decreases in access charge rate levels, the IURC found that a “demonstration of such pass through for interLATA toll providers” and for “toll providers in areas where intraLATA equal access has been implemented” is not required at this time.²⁶³ However, the IURC expressly stated that it may revisit this issue in the future.²⁶⁴ Moreover, the IURC found that reporting requirements showing the benefits of access charge reductions passed through to the customers may be necessary, and that such reporting requirements would be considered in company-specific rate compliance proceedings.²⁶⁵

III. THE MERGER BETWEEN SBC AND AMERITECH

One of the most significant and publicized developments in Indiana law during the survey period concerned whether section 8-1-2-83(a) of the Indiana Code²⁶⁶ gave the IURC authority to approve the merger (worth approximately

257. See *id.* at 11.

258. *Id.*

259. See *id.*

260. See *id.* at 13.

261. See *id.* at 11.

262. See *id.*

263. *Id.* at 12.

264. See *id.*

265. See *id.*

266. IND. CODE § 8-1-2-83(a) (1998) provides in relevant part:

\$60 billion) between SBC Communications Corporation ("SBC") and Ameritech Corporation ("Ameritech").²⁶⁷ On an Emergency Petition to Transfer, the Indiana Supreme Court appropriately answered this question in the negative in *Indiana Bell Telephone Co. v. Indiana Utility Regulatory Commission*.²⁶⁸

Prior to the merger, Ameritech was the corporate parent and holding company of Indiana Bell Telephone Company Incorporated d/b/a Ameritech Indiana ("Ameritech Indiana").²⁶⁹ Ameritech Indiana is the public utility that operates sixty-five percent of the local exchange telephone access lines in Indiana.²⁷⁰ The transaction between SBC and Ameritech involved a merger between Ameritech and a wholly-owned subsidiary of SBC and a stock-swap whereby Ameritech shareholders transferred shares of Ameritech stock to SBC in exchange for shares of the SBC subsidiary.²⁷¹ The transaction transferred control of Ameritech Indiana to SBC, though Ameritech Indiana itself did nothing to effectuate the transaction. Upon closing, Ameritech Indiana became a wholly-owned subsidiary of Ameritech, which, in turn, became a wholly-owned subsidiary of SBC.²⁷² Ameritech Indiana remains "the same regulated

No public utility, as defined in section 1 [IND. CODE § 8-1-2-1] of this chapter, shall sell, assign, transfer, lease, or encumber its franchise, works or system to any other person, partnership, limited liability company, or corporation, or contract for the operation of any part of its works or system by any other person, partnership, limited liability company, or corporation, without the approval of the commission after hearing.

Id.

267. This issue also affected the proposed merger between GTE Corporation and Bell Atlantic Corporation.

268. 715 N.E.2d 351 (Ind. 1999). *See also* GTE Corp. v. Indiana Util. Regulatory Comm'n, 715 N.E.2d 360 (Ind. 1999) (upholding the decision in *Indiana Bell* unanimously and denying the IURC jurisdiction under section 8-1-2-83(a) of the Indiana Code to approve the merger between GTE Corporation and Bell Atlantic Corporation).

269. *See Indiana Bell*, 715 N.E.2d at 353. Ameritech was also the corporate parent and holding company of the operating telephone public utilities in Michigan, Wisconsin, Ohio, and Illinois. *See id.*

270. *See id.*

271. *See id.*

272. *See id.* Generally, such mergers also require approval by the FCC. The Ameritech/SBC merger has been approved by the FCC subject to certain conditions. *See In re Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Section 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, 14 F.C.C.R. 14,712 (released Oct. 8, 1999). Other mergers currently pending before the FCC include mergers between MCI WorldCom and Sprint, US West and Qwest, AT&T and TCI, and GTE Corporation and Bell Atlantic Corporation. For more information concerning these mergers, see *Merger of Common Carriers Requiring FCC Approval* (visited June 12, 2000) <<http://www.fcc.gov/ccb/mergers.html>>.

Additionally, some states have enacted statutes that specifically require approval by state commissions of the transfer of a controlling interest in a utility such as the SBC/Ameritech merger.

utility . . . with the same assets and liabilities, the same customers and suppliers, and the same corporate structure and capitalization.”²⁷³

In September 1998, the IURC issued an Order initiating an investigation of the merger under sections 8-1-2-58, 83, and 84 of the Indiana Code, and for the purposes of filing comments with the FCC on the grounds that “we believe the merger of SBC, which also operates various telephone subsidiaries in Indiana, with Ameritech Indiana’s parent could affect the state of telephone competition in Indiana, and might also impact employment levels, quality of service, and even rates”²⁷⁴ Following eight months of investigation, the IURC issued an Order on May 5, 1999, asserting jurisdiction to approve or disapprove the merger pursuant to section 83(a).²⁷⁵ In doing so, the IURC overruled its own prior precedent²⁷⁶ and distinguished Indiana Supreme Court precedent²⁷⁷ holding that section 83(a) of the Indiana Code does not provide the IURC with jurisdiction to approve transfers of stock. The IURC stated:

Prior Commission decisions to the contrary notwithstanding, we thus find a transaction in which at least fifty percent of a public utility’s voting capital stock is sold, transferred, etc. necessarily constitutes a sale transfer, etc. of that public utility’s franchise, works, or system. And when a corporation qualifies as a public utility under I.C. 8-1-2-1(a) and a transaction would involve the sale, assignment, transfer, lease or encumbrance of a majority of the voting capital stock in that corporation to some other person or corporation, we find that Section 83(a) requires our review of the proposed transaction.²⁷⁸

Respondents SBC, Ameritech, and Ameritech Indiana appealed.²⁷⁹

The Appellants argued that the express language of section 83(a) clearly evinces the legislative intent that transactions at the holding company level

See *Indiana Bell*, 715 N.E.2d at 357. The state commissions of Illinois and Ohio both approved the merger between SBC and Ameritech. See *id.*

273. *Id.* at 354.

274. *In re Ameritech Corp.*, No. 41255, 1998 WL 999989, at *1 (Ind. U.R.C. Sept. 2, 1998).

275. See *Indiana Bell*, 715 N.E.2d at 353.

276. See *In re Dalecarlia Util. Corp.*, No. 38827 (Ind. U.R.C. Apr. 11, 1990); *In re Madison Light & Power Co.*, 1924C P.U.R. 517 (PISC 1994).

277. See *Office of the Util. Consumer Counselor v. Public Serv. Co.*, 608 N.E.2d 1362 (Ind. 1993) [hereinafter *OUC v. PSI*].

278. *In re Investigation on the Commission’s Own Motion into All Matters Relating to the Merger of Ameritech Corp. and SBC Communications, Inc.*, No. 41255, at *5-6 (Ind. U.R.C. May 5, 1999).

279. Under section 8-1-3-1 of the Indiana Code, final orders of the IURC are appealed to the Indiana Court of Appeals. See IND. CODE § 8-1-3-1 (1998). However, in this case, the Indiana Supreme Court granted an Emergency Petition to Transfer filed by Respondents SBC, Ameritech and Ameritech Indiana pursuant to Indiana Appellate Rule 4(A)(9) and set an expedited briefing schedule. See *Indiana Bell*, 715 N.E.2d at 353.

involving transfers of stock not be regulated by the IURC.²⁸⁰ The IURC and Office of the Utility Consumer Counselor ("OUCC") argued that the merger is the "functional equivalent of a transfer of all of [Ameritech Indiana's] assets to SBC" and that the merger would shift "control" of Ameritech Indiana from Ameritech to SBC.²⁸¹ Thus, the IURC and OUCC argued that the IURC had jurisdiction to approve or disapprove the merger.²⁸²

The court first looked to the express language of section 83(a) of the Indiana Code, and examined the meanings of "public utility" and "franchise, works, or system."²⁸³ The court noted that "public utility" is expressly defined in section 8-1-2-1(a) of the Indiana Code to mean an entity "that may own, operate, manage, or *control* any plant or equipment within the state."²⁸⁴ The court held that while this language could be interpreted to include within the definition of "public utility" an entity that has "control" of the plant or equipment through stock ownership, "a very sizeable body of precedent points in the other direction."²⁸⁵ Including holding companies within the definition of public utilities "would effect a major change in relatively settled doctrine," calling into question several past transactions involving holding companies.²⁸⁶ Furthermore, the court noted that if holding companies are public utilities within the statutory definition, then "a vast number of very public violations of these sections have been committed over the years in full view of the [IURC], the courts and the General Assembly" without concern evidencing the "common understanding" that holding companies are not public utilities within the statute.²⁸⁷

Next, the court analyzed what constitutes the "franchise, works, or system" of the utility. Noticeably absent from the phrase "franchise, works, or system" is the term "stock."²⁸⁸ Therefore, a transfer of outstanding shares of stock should not fall within the mandate of section 83(a). This is precisely how the Indiana Supreme Court interpreted the language in section 83(a) in *OUCC v. PSI*.²⁸⁹ There, the court held that section 83(a) did not give the IURC authority to approve a transaction that involved PSI's creation of a holding company in which shares of the operating company were exchanged for shares of the holding company.²⁹⁰ Appellees attempted to distinguish this precedent on the grounds that the transaction at issue in *OUCC v. PSI* did not involve a transfer in control of the utility, because following the transaction the same shareholders, the board

280. *See id.* at 354.

281. *Id.*

282. *See id.*

283. *Id.* at 355-56.

284. *Id.* at 355 (emphasis added) (quoting IND. CODE § 8-1-2-1).

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.* at 355-56.

289. *See id.* at 356 (citing *OUCC v. PSI*, 608 N.E.2d 1362 (Ind. 1993)).

290. *See id.*

of directors and management still controlled.²⁹¹ While the court agreed that the *OUC v. PSI* transfer differed from the merger between SBC and Ameritech in this respect, the court noted that the rationale in *OUC v. PSI* concerned the fact that the object of the transfer—the stock—was not the “franchise, works, or system” of a public utility and *not* whether there was an absence of a “transfer.”²⁹² Accordingly, the court rejected Appellees’ distinction and reaffirmed the holding of *OUC v. PSI* “that transactions by a public utility’s shareholders do not require [IURC] approval.”²⁹³

The court rejected Appellees’ arguments that section 83(a) should be read to apply to stock transactions because it should be construed *in pari materia* with sections 83(b) and (d), which both expressly refer to the “stock” of a public utility.²⁹⁴ However, the fact that sections 83(b) and (d) each expressly refer to “stock” led the court to the opposite conclusion that the general assembly consciously excluded “stock” from the transaction affected by section 83(a) because “the General Assembly knows how to say stock when it means stock.”²⁹⁵

The court was also persuaded by Appellants’ presentation of the legislative history of section 83(a), which according to the court, “embodies a specific choice by the legislature not to require approval of shareholder transactions. . . . [T]he General Assembly has repeatedly made the conscious decision not to include holding companies within the definition of ‘public utility.’”²⁹⁶ In the 1920s and 1930s, abuse of the holding company structure was “rampant,” and the General Assembly was called upon on three separate occasions to regulate public utility holding companies.²⁹⁷ On each occasion, the General Assembly declined to extend the statutory definition of “public utility” to include holding

291. See *PSI*, 608 N.E.2d at 1364.

292. *Id.*

293. *Id.* The court also rejected the IURC’s reliance on *Illinois-Indiana Cable Television Association, Inc. v. Public Service Commission*, 427 N.E.2d 1100 (Ind. Ct. App. 1981) finding the opinion to have “no bearing on a transfer by shareholders of a public utility’s holding company.” *Indiana Bell*, 715 N.E.2d at 359. Even if the case did have bearing, the opinion is a court of appeals opinion superseded by the Indiana Supreme Court’s holding in *OUC v. PSI*. See *id.* at 359. Additionally, the court rejected the OUC’s reliance on *In re Central Vermont Public Service Commission*, 84 P.U.R.4th 213 (F.E.R.C. 1987) which held that the Federal Energy Regulatory Commission (“FERC”) had jurisdiction over the creation of a holding company by the sale of a utility’s stock under the Federal Power Act. See *Indiana Bell*, 715 N.E.2d at 359.

294. *Id.* at 356. IND. CODE § 8-1-2-83(b) (1998) provides in relevant part: “No such public utility shall directly or indirectly purchase, acquire, or become the owner of any of the property, stock, or bonds of any other public utility . . . unless authorized to so by the commission.” *Id.* IND. CODE § 8-1-2-83(d) provides in relevant part: “Every contract by any public utility for the purchase, acquisition, assignment, or transfer to it of any of the stock of any other public utility . . . without the approval of the commission shall be void and of no effect . . .” *Id.*

295. *Indiana Bell*, 715 N.E.2d at 356.

296. *Id.*

297. *Id.* at 357.

companies.²⁹⁸ In 1933, however, the General Assembly enacted a statute, now codified at section 8-1-2-49 of the Indiana Code, authorizing the IURC²⁹⁹ to investigate a public utility's affiliates.³⁰⁰ The court concluded that:

In light of the three failed attempts in the preceding six years to include holding companies in the definition of public utility, this addition must be viewed as a compromise that brought holding companies under limited scrutiny of the Commission by providing access to affiliate information, but did not go so far as to subject them to all requirements imposed on a public utility. In short, we agree with appellants that section 49 "reflects a continued legislative choice to use indirect, rather than direct, regulation of holding companies."³⁰¹

Turning to the IURC's prior precedent interpreting section 83(a), the court noted that as recently as 1990 the IURC held that it does not have jurisdiction to approve stock transfers at the shareholder level.³⁰² Although the IURC has recently approved several transactions involving holding companies, each case concerned a *voluntary* request for approval by the public utility and its holding company parent, and thus the issue of the IURC's section 83(a) jurisdiction was not questioned or litigated.³⁰³ Such voluntary submission to the IURC's jurisdiction does not affect the scope of the IURC's statutory jurisdiction under section 83(a).³⁰⁴ The IURC further argued that it is not bound by its prior decisions and that the change in interpretation of its jurisdiction under section 83(a) is necessary "in order to avoid the 'shipwrecking justice' in light of the 'modern economic reality that holding-company transactions . . . are the method *du jour* by which control of utilities is transferred.'"³⁰⁵ Although the court agreed that the IURC is not bound by its prior rulings, it held that the legislative history demonstrates that the IURC's authority under section 83(a) had been resolved by the General Assembly and the issue is not open to administrative or judicial interpretation.³⁰⁶

Similarly, the court found that the doctrine of legislative acquiescence lent

298. *Id.* (citing 1925 JOURNAL OF THE STATE SENATE OF INDIANA, 11-12, 178-79; Senate Bill 18, 74th General Assembly (Ind. 1925); 1929 JOURNAL OF THE STATE HOUSE OF REPRESENTATIVES OF INDIANA, 448-49; and 1931 JOURNAL OF THE STATE SENATE OF INDIANA, 121, 621-22).

299. At that time, the IURC was called the Public Service Commission of Indiana.

300. *See Indiana Bell*, 715 N.E.2d at 357 (citing ACTS OF THE INDIANA GENERAL ASSEMBLY, 1933, ch. 190, § 6.)

301. *Id.*

302. *See id.* (citing *In re Dalecarlia Util. Corp.*, No. 38827, 1990 Ind. PUC LEXIS 114, at *4 (Ind. U.R.C. Apr. 11, 1990).

303. *See id.* at 358 (citing *In re Frontier Corp.*, No. 40205, 1995 WL 735627 (Ind. U.R.C. July 12, 1995); *In re Rochester Tel. Corp.*, No. 40099, 1995 Ind. PUC LEXIS 40 (Ind. U.R.C. Feb. 8, 1995)).

304. *See id.*

305. *Id.* (citation omitted).

306. *See id.* at 358, 360.

credence to the IURC's prior precedent holding that it did not have jurisdiction under section 83(a):

[W]e assume that if the General Assembly were dissatisfied with the Commission's long-standing interpretation of section 83(a) or this court's decision in *PSI*, it would have amended the Act to include holding companies in the definition of "public utility," or to regulate transactions in control of a utility regardless of the parties to this transaction.³⁰⁷

The court further dismissed arguments by the IURC that Appellants could not rely upon the doctrine of legislative acquiescence without a showing of detrimental reliance.³⁰⁸ The court stated that even if Appellants could not make such a showing, a holding that the IURC has jurisdiction to approve or disapprove stock transfers at the holding company level would have profound implications on transactions by other holding companies relying upon the previous IURC precedent.³⁰⁹

Finally, citing the potential for abuse by holding companies, Appellees argued that public policy requires that the IURC have jurisdiction to approve or disapprove transactions such as the merger between SBC and Ameritech in order to adequately protect the interests of the ratepayers.³¹⁰ The court conceded that such public policy arguments were "compelling"³¹¹ and that authorizing the IURC to approve or disapprove such mergers may indeed be more effective and efficient in protecting the interests of ratepayers.³¹² Nonetheless, such "arguments are for the General Assembly, not this Court or the [IURC]."³¹³

IV. OPPORTUNITY INDIANA

Another proceeding that was before the IURC and the Indiana Court of Appeals during the survey period concerned Ameritech Indiana's alternative regulation under section 8-1-2.6 of the Indiana Code³¹⁴ commonly known as

307. *Id.* at 358.

308. *See id.*

309. *See id.* at 358-59.

310. *See id.* at 360.

311. *Id.*

312. *See id.*

313. *Id.* On October 6, 1999, the IURC issued an order acknowledging that given the Indiana Supreme Court's decision, it did not have jurisdiction to approve or disapprove the merger.

314. IND. CODE § 8-1-2.6 is hereinafter referred to as the "alternative regulation statute." "Alternative regulation" refers to a manner of regulation different than regulation under a traditional rate of return methodology. *See* IND. CODE §§ 8-1-2.6-1, -8 (1998). For a discussion of traditional rate of return methodology, see *City of Evansville v. Southern Indiana Gas & Electric Co.*, 339 N.E.2d 562, 568-71 (Ind. App. 1975). IND. CODE § 8-1-2.6-1(5) authorizes the IURC to formulate and adopt rules and policies as will permit the commission, in the exercise of its expertise, to regulate and control the provision of telephone services to the public in

an increasingly competitive environment, giving due regard to the interests of consumers and the public and to the continued availability of universal telephone service.

Id. IND. CODE § 8-1-2.6-2 allows the IURC to decline to exercise jurisdiction over telephone companies or services providing in relevant part:

(a) Notwithstanding any other statute, the commission may . . . enter an order, after notice and hearing, that the public interest requires the commission to commence an orderly process to decline to exercise, in whole or in part, its jurisdiction over telephone companies or certain telephone services.

(b) In determining whether the public interest will be served, the commission shall consider:

(1) Whether technological change, competitive forces, or regulation by other state and federal regulatory bodies render the exercise of jurisdiction by the commission unnecessary or wasteful;

(2) Whether the exercise of commission jurisdiction produces tangible benefits to telephone company customers; and

(3) Whether the exercise of commission jurisdiction inhibits a regulated entity from competing with unregulated providers of functionally similar telephone services or equipment.

Id. IND. CODE § 8-1-2.6-3 authorizes the IURC to adopt alternative regulatory procedures and provides in relevant part:

Notwithstanding any other statute, the commission may . . . adopt rules or by an order in a specific proceeding provide for the development, investigation, testing, and utilization of regulatory procedures or generic standards with respect to telephone companies or services. The commission shall adopt the rules or enter an order only if it finds, after notice and hearing, that the regulatory procedures or standards are in the public interest and promote (1) or more of the following:

(1) Telephone company cost minimization to the extent that a telephone company's quality of service and facilities are not diminished.

(2) A more accurate evaluation by the commission of a telephone company's physical or financial conditions or needs, as well as a less costly regulatory procedure for either the telephone company, its consumers, or the commission.

(3) Development of depreciation guidelines and procedures that recognize technological obsolescence.

(4) Increased telephone company management efficiency beneficial to consumers.

(5) Regulation consistent with a competitive environment.

Opportunity Indiana. The proceedings before the IURC resulted in the Final Order on Interim Relief ("Final Order")³¹⁵ that changed the way Ameritech Indiana was regulated under Opportunity Indiana, required a rate reduction for residential and business basic local services, and ordered Ameritech Indiana to comply with infrastructure investment commitments that were a part of the settlement agreement that established Opportunity Indiana.³¹⁶ Ameritech Indiana appealed the Final Order,³¹⁷ and on October 14, 1999, the Indiana Court of Appeals issued its opinion in *Indiana Bell v. OUCC*.³¹⁸

First and foremost, the court held that the IURC unlawfully ordered Ameritech Indiana to reduce its rates for residential and business basic local services.³¹⁹ In the Opportunity Indiana proceedings, the IURC was not acting pursuant to its traditional rate making authority,³²⁰ but rather pursuant to the authority contained in the alternative regulation statute.³²¹ Consequently, in adopting the alternative regulation and rate reduction in the Final Order, the IURC was required to act according the provisions set forth in section 8-1-2.6-3.³²² These provisions require the IURC to provide an opportunity for notice and hearing prior to adopting any alternative regulatory standards, to find that the alternative regulatory standards are in the public interest, and to find that the

Id.

315. Ameritech Indiana's original alternative regulatory plan under Opportunity Indiana expired on December 31, 1997. Under the terms of the settlement agreement establishing Opportunity Indiana, the earliest date Ameritech Indiana could petition for a "successor" alternative regulatory plan was May 1, 1997. *See Indiana Bell Tel. Co. v. Office of Util. Consumer Counselor*, 717 N.E.2d 613, 618 (Ind. Ct. App. 1999). On May 1, 1997, Ameritech Indiana petitioned the IURC for such relief. However, there was not enough time to establish a permanent alternative regulatory plan prior to the expiration of Opportunity Indiana 1. The IURC directed Ameritech Indiana to proceed on the issue of what interim relief should apply pending the IURC's final order on permanent alternative regulatory relief. *See id.* On December 30, 1997, the IURC issued the Final Order on Interim Relief which was the subject of the appeal discussed below." *See generally id.* The background and specifics of Opportunity Indiana will not be covered in this article. However, the court's opinion in *Indiana Bell v. OUCC* does an excellent job of succinctly stating the factual and procedural history of Opportunity Indiana, and the reader is referred to the court's opinion for further background information. *See id.* at 616-20.

316. *See In re Petition of Indiana Bell Telephone Co. d/b/a Ameritech Indiana for the Commission to Decline to Exercise in Whole or in Part its Jurisdiction Over, and to Utilize Alternative Regulatory Procedures for, Ameritech Indiana's Provision of Retail and Carrier Access Services Pursuant to I.C. 8-1-2.6 et seq.*, No. 40849, 1999 WL 590486 (Ind. U.R.C. Dec. 30, 1997).

317. The OUCC cross-appealed.

318. *See Indiana Bell*, 717 N.E.2d at 613.

319. *See id.* at 624-25.

320. Under its traditional ratemaking authority, if the IURC finds that rates are unjust or unreasonable, it is authorized to fix "just and reasonable rates" for the future. *See IND. CODE § 8-1-2-68* (1998).

321. *See Indiana Bell*, 717 N.E.2d at 622.

322. *See id.*

alternative regulatory standard promotes at least one of the standards set forth in section 8-1-2.6-3.³²³

The court found that the IURC did not comply with the notice and hearing requirements before adopting the alternative regulation and rate reduction.³²⁴ Ameritech Indiana's Petition for Interim Relief requested that if an order on permanent relief could not be issued prior to the expiration of Opportunity Indiana, that the alternative regulatory procedures contained in Opportunity Indiana continue in the interim.³²⁵ While notice and a hearing were provided to determine whether interim relief was *appropriate*, notice and a hearing concerning the *adoption* of an alternative regulatory standard were not provided.³²⁶ According to the court, this was not sufficient to meet the notice and hearing requirements of section 8-1-2.6-3:

We interpret the statute as requiring the Commission to give notice of the specific alternative regulatory procedure it is considering with sufficient specificity to allow interested parties to present evidence and participate in a hearing on that procedure. It is not sufficient for the Commission to give notice that it is considering some undecided form of alternative regulatory procedure.³²⁷

The court also held that the Final Order did not set forth the requisite findings showing that the alternative regulation and rate reduction are in the public interest and promote the criteria set forth in section 8-1-2.6-3.³²⁸ Accordingly, the court held the Final Order to be contrary to law and reversed and remanded the Final Order to the IURC to make a determination as to interim relief consistent with the court's holding.³²⁹

Pending the IURC's determinations, the court held that Ameritech Indiana's rates on file with the IURC upon the expiration of Opportunity Indiana should remain in place.³³⁰ Under section 8-1-2-44 of the Indiana Code, a public utility must charge the rates on file with the IURC until such rates are changed in accordance with the Public Service Commission Act.³³¹ Thus, in order to lawfully change Ameritech Indiana's rates, the IURC must act pursuant to either its traditional ratemaking authority or through section 8-1-2.6-3, which as

323. *See id.*

324. *See id.*

325. *See id.*

326. *See id.* at 622-23. The IURC's preliminary order on interim relief set a procedural schedule that included an evidentiary hearing to consider additional evidence on the form that interim relief should take. *See id.* at 622. This procedural schedule was subsequently vacated, prefiled testimony was stricken, and parties were directed to submit briefs based on the existing record. *See id.* at 623.

327. *Id.*

328. *See id.* at 624.

329. *See id.*

330. *See id.* at 625.

331. *See id.* (citing IND. CODE § 8-1-2-44 (1998)).

discussed, requires the opportunity for notice and hearing.³³²

Citing section 8-1-2-68 of the Indiana Code, which provides that the IURC may fix just and reasonable rates only to be applied in the *future*,³³³ the court further rejected OUCC's argument that Ameritech Indiana's interim rates should be subject to further review and refund.³³⁴ It is settled law in Indiana that the IURC may not engage in retroactive ratemaking,³³⁵ and thus, the IURC is not authorized "to fix Ameritech[] [Indiana's] rates on an interim basis, rescind those rates after further review and require any overcharges to be returned to consumers."³³⁶

Finally, the court disagreed with Ameritech Indiana that the Final Order was contrary to law because it effectively "rewrites" Ameritech Indiana's infrastructure investment commitments in the Opportunity Indiana settlement agreement.³³⁷ Specifically, the evidence in the proceedings before the IURC showed that Ameritech Indiana only provided \$15.6 million in infrastructure investments out of the agreed "\$20 million per year for each year 1994-1999 to provide digital switching and transport facilities . . . to every interested school, hospital and major government center . . ."³³⁸ Ameritech Indiana argued, however, that it was unable to generate interest in schools, hospitals, and government centers sufficient to meet this obligation.³³⁹ The IURC was not persuaded, and found that Ameritech Indiana failed to comply with its infrastructure investment obligation.³⁴⁰ The IURC stated that if Ameritech Indiana "has trouble generating sufficient interest, it should try harder, perhaps with the advice and assistance of other parties to the Settlement Agreement . . . or to otherwise propose some other means for its shareholders to provide infrastructure improvements consistent with (the terms of Opportunity Indiana)."³⁴¹

The court agreed with the IURC and found that Ameritech Indiana "undertook an *unconditional* commitment to make certain infrastructure investments that would be in effect for the six-year period of 1994 through 1999," and upheld the Final Order in this respect.³⁴² While the court agreed with Ameritech Indiana that it would be error for the IURC to impose upon Ameritech Indiana infrastructure commitments not specified in the Opportunity Indiana

332. See *id.*

333. See IND. CODE § 8-1-2-68.

334. See *Indiana Bell*, 717 N.E.2d at 625.

335. See *id.*

336. *Id.*

337. See *id.* at 625-26.

338. *Id.* at 626.

339. See *id.*

340. See *id.*

341. *Id.* (citation omitted).

342. *Id.* (emphasis added).

settlement agreement, the Final Order “merely states that Ameritech [Indiana] may propose alternative methods by which it might provide the required infrastructure investments in a manner which would comply with the terms and the intent of Opportunity Indiana.”³⁴³

343. *Id.* at 627 n.12. The court discussed the potential contract liability of Ameritech Indiana. Finding the Opportunity Indiana settlement agreement to be properly enforced according to the general principles of contract law, the court held that Ameritech Indiana’s failure to provide the infrastructure investments could be construed as a breach of contract. The court stated that if the IURC found such breach, Ameritech Indiana could be liable for damages and be required “to return to the public of over \$100 million in funds which were supposed to be made available for infrastructure improvements as well as any damages which might be proven by other settling parties under Opportunity Indiana.” *Id.* at 627-28 n.12.

RECENT DEVELOPMENTS IN INDIANA TORT LAW

TAMMY J. MEYER*
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INTRODUCTION

From October 1998 to October 1999, Indiana state and federal courts rendered a number of significant decisions in the dynamic realm of tort law. Significant consideration was given to areas of premises liability, medical malpractice, and wrongful death. These decisions have clarified existing rules of law, recognized new theories, and expanded the scope of existing tort law in Indiana.

I. NEGLIGENCE

A. Landowners' Potential Responsibility for Third-Party Criminal Attacks

During the course of this survey period, Indiana courts rendered numerous decisions interpreting a landowner's potential responsibility for third-party criminal attacks upon invitees. In three early decisions, the Indiana Court of Appeals was faced with the issue of whether a landowner could be held responsible for an invitee's injuries that resulted from a criminal act of a third-party on its premises.¹ The court consistently found that there is generally no duty on the part of a business owner to protect its patrons against the criminal acts of third persons unless the particular facts make it reasonably foreseeable that the criminal act will occur.² Thus, a duty to anticipate and take steps to protect against criminal acts of a third-party arises only when the particular circumstances render it reasonably foreseeable that a criminal act is likely to occur. The Indiana Court of Appeals also addressed the issue of the gratuitous assumption of a duty to protect invitees from criminal acts of third parties. Specifically, the court noted that liability may be imposed upon a landlord who voluntarily undertakes or assumes a duty to protect an invitee from the criminal acts of a third-party.³

The Indiana Supreme Court recognized that it had not recently addressed the issue of whether, and to what extent, landowners owe any duty to protect their invitees from the criminal acts of third-parties and expressed concern for disagreements in the court of appeals regarding this area of tort law.⁴ The supreme court stated that issues concerning a landowner's potential responsibility for third-party criminal attacks upon invitees have been the subject of substantial

1. See *American Legion Pioneer Post No. 340 v. Christon*, 712 N.E.2d 532 (Ind. Ct. App. 1999); *Basicker v. Denny's, Inc.*, 704 N.E.2d 1077 (Ind. Ct. App. 1999); *Vertucci v. NHP Management Co.*, 701 N.E.2d 604 (Ind. Ct. App. 1998).

2. See *American Legion*, 712 N.E.2d at 534 (citing *Welch v. Railroad Crossing, Inc.*, 488 N.E.2d 383, 388 (Ind. Ct. App. 1986)); *Basicker*, 704 N.E.2d at 1080 (citing *Fast Eddie's v. Hall*, 688 N.E.2d 1270, 1272-73 (Ind. Ct. App. 1997)); *Vertucci*, 701 N.E.2d at 607 (citing *Center Management Corp. v. Bowman*, 526 N.E.2d 228, 230 (Ind. Ct. App. 1998)).

3. See *American Legion*, 712 N.E.2d at 535; *Vertucci*, 701 N.E.2d at 607.

4. See *Delta Tau Delta v. Johnson*, 712 N.E.2d 968, 971 (Ind. 1999).

debate among the courts and legal scholars in the past decade.⁵ The court recognized that the majority of courts that have addressed this issue agree that while landowners are not to be made the insurers of their invitees' safety, they do have a duty to take reasonable precautions to protect their invitees from foreseeable criminal attacks.⁶ The court also noted that Indiana courts have not held otherwise.⁷ However, it recognized that courts employ different approaches to determine whether a criminal act was foreseeable such that a landowner owed a duty to take reasonable care to protect an invitee from the criminal act.⁸

On July 12, 1999, the Indiana Supreme Court issued three opinions concerning a landowner's duty to protect invitees against criminal attacks by third parties. The cases of *Delta Tau Delta v. Johnson*,⁹ *Vernon v. Kroger*,¹⁰ and *L.W. v. Western Golf Assoc.*,¹¹ discussed more fully below, adopt and apply the "totality of the circumstances" test to determine whether a duty exists in any given case.

In the lead case of *Delta Tau Delta*, the plaintiff, an undergraduate student at Indiana University, was sexually assaulted in the Delta Tau Delta fraternity house where she had attended a party. She initiated a civil action against the perpetrator and the fraternity organization, claiming that the fraternity breached its duty of care to provide reasonable protection, security and supervision at the party.¹² The fraternity moved for summary judgment on the issue of duty, arguing that it owed no duty to protect the plaintiff from the foreseeable acts of a third party. The trial court denied the fraternity's motion. On appeal, the Indiana Court of Appeals reversed, holding that the fraternity owed no duty to the plaintiff as a matter of law.¹³ The Indiana Supreme Court granted transfer to address the question of whether, and to what extent, landowners owe a duty to protect their invitees from the criminal acts of third parties.¹⁴

The supreme court analyzed four basic tests employed by various courts to determine foreseeability in this context: (1) the specific harm test; (2) the prior similar incidents test; (3) the totality of the circumstances test; and (4) the balancing test. After considering all four tests, the court adopted the totality of the circumstances test.¹⁵ The court noted that "[a] substantial factor in the

5. See *id.* (citing *McClung v. Delta Square Ltd. Partnership*, 937 S.W.2d 891, 897 (Tenn. 1996) (noting that the debate caused the court to reconsider its law in this area)).

6. See *id.*

7. See *id.* (citing *McClung*, 937 S.W.2d at 898-99); *Kinsey v. Bray*, 596 N.E.2d 938 (Ind. Ct. App. 1992).

8. See *Delta Tau Delta*, 712 N.E.2d at 971.

9. 712 N.E.2d 968 (Ind. 1999).

10. 712 N.E.2d 976 (Ind. 1999).

11. 712 N.E.2d 983 (Ind. 1999).

12. See *Delta Tau Delta*, 712 N.E.2d at 971.

13. See *Motz v. Johnson*, 651 N.E.2d 1164 (Ind. Ct. App. 1995), *rev'd*, *Delta Tau Delta*, 712 N.E.2d at 968.

14. See *Delta Tau Delta*, 712 N.E.2d at 970.

15. See *id.* at 971-73.

determination of duty is the number, nature and location of prior similar incidents, but the lack of prior similar incidents will not preclude a claim where the landowner knew or should have known that the criminal act was foreseeable."¹⁶ The court concluded by explicitly stating that Indiana courts confronted with the issue of whether a landowner has a duty to take reasonable care to protect an invitee from the criminal acts of a third party should apply the totality of the circumstances test to determine whether the crime was foreseeable.¹⁷

Applying this newly announced test to the facts, the court concluded that the fraternity owed the plaintiff a duty of care.¹⁸ Within two years of the incident, two similar prior incidents took place. In addition, in the month prior to the sexual assault at issue, the fraternity had been provided with information concerning rape and sexual assault on college campuses, including statistics as to the number of college women raped, the association of drug and alcohol with rape, the incidence of gang rape involving fraternities, and recent legal action taken against fraternities at seven universities.¹⁹ The court held that "to hold that a sexual assault in this situation was not foreseeable, as a matter of law, would ignore the facts and allow [the fraternity] to flaunt the warning signs at the risk of all its guests."²⁰ Consequently, the fraternity was held to owe a duty to take reasonable care to protect the plaintiff from a foreseeable sexual assault. The court suggested that only "exceptional" cases will warrant imposing this duty upon a landowner in a social host situation to take reasonable care to protect an invitee from the criminal acts of another.²¹

In *Vernon v. Kroger*,²² the Indiana Supreme Court again answered the question of whether a landowner owes an invitee a duty to take reasonable care to protect against a third party criminal attack by asking whether the totality of the circumstances demonstrates that the criminal act was reasonably foreseeable.²³ In *Vernon*, the plaintiff, a customer of Kroger, was assaulted and beaten in the parking lot by two men who had shoplifted in the store. The trial court granted summary judgment for Kroger, finding that it owed no duty to the plaintiff to protect against third-party criminal attacks. The court of appeals affirmed the ruling, and the supreme court granted transfer.²⁴

The supreme court reversed the lower courts' rulings, holding that it was reasonably foreseeable to Kroger that a customer who got in the way of a fleeing

16. *Id.* at 973.

17. *See id.* The supreme court noted in passing that this is not the sole means by which a plaintiff may establish that a landowner owed the plaintiff a duty; a landowner may also voluntarily or contractually assume a duty to protect a plaintiff from criminal acts. *See id.*

18. *See id.*

19. *See id.* at 973-74.

20. *Id.* at 974.

21. *Id.*

22. 712 N.E.2d 976 (Ind. 1999).

23. *See id.* at 979 (citing *Delta Tau Delta*, 712 N.E.2d at 973).

24. *See id.* at 978-79.

shoplifter might be harmed.²⁵ The court noted that shoplifting was not an unusual occurrence at the Kroger store and that it was enough of a problem that Kroger employed off-duty police officers to patrol the store and deter shoplifters.²⁶ Criminal activity often occurred in the parking lot, calls to the police for what the court considered "crimes of violence" occurred approximately once every other month, and calls to the police for battery and shoplifting occurred almost once a week.²⁷ Under these facts, the court held that it was error to find Kroger owed no duty to the plaintiff and reversed the grant of summary judgment in favor of the defendant.²⁸

In *L.W. v. Western Golf Assoc.*,²⁹ the Indiana Supreme Court, applying the totality of the circumstances test, held that the defendant did not owe a duty to the plaintiff to protect her against a sexual assault. Plaintiff was a sophomore and Evans Scholar at Purdue University. While visiting a bar with some friends one evening, she became intoxicated. A fellow freshman Evans Scholar student and Evans Scholar house resident helped the plaintiff to her room.³⁰ He later returned to the plaintiff's room after she had passed out and raped her while she lay unconscious. Plaintiff brought a negligence action against the scholarship foundation and the housing sponsor, alleging that they had a duty to provide for a safe living environment. Defendants filed a Motion for Summary Judgment on the issue of duty and the trial court granted the motion.³¹

On transfer, the Indiana Supreme Court held that the record provided sufficient evidence to find that defendants did not owe the plaintiff a duty to protect her from the criminal attack.³² The court reasoned that while co-ed living at the Evans Scholar house was not always pleasant for women, there was no evidence of any prior violent acts or sexual assaults at the house.³³ Although there was evidence of deplorable childish pranks and sexually-charged comments, the court found the evidence insufficient to find that the rape in question was reasonably foreseeable.³⁴

Several months after this trio of cases, the supreme court once again visited the issue of a landowner's duty to protect invitees against criminal attacks by third-parties. In *Ellis v. Luxbury Hotels, Inc.*,³⁵ the plaintiff brought a negligence action against a hotel seeking damages for personal injuries he sustained while he was visiting a guest at the hotel. The trial court granted the hotel's motion for

25. See *id.* at 980.

26. See *id.*

27. *Id.*

28. See *id.*

29. 712 N.E.2d 983 (Ind. 1999).

30. See *id.* at 984.

31. See *id.*

32. See *id.* at 985.

33. See *id.*

34. See *id.*

35. 716 N.E.2d 359 (Ind. 1999).

summary judgment and the court of appeals affirmed.³⁶

On transfer, the Indiana Supreme Court held that the hotel owed the plaintiff no duty to protect him from the unforeseeable criminal attack.³⁷ The court noted that although there was little dispute that a hotel guest is at least the equivalent of a business invitee and, as such, is entitled to a duty of reasonable care for the guest's safety, this case is unique in that it involved an injury to the guest of a guest.³⁸ Although the supreme court was unable to find Indiana cases concerning the duty owed by a hotel to the guest of a guest, it reasoned by analogy from cases finding that a landlord owes his tenant's social guests the same duty as the landlord owes his tenants.³⁹

Accordingly, the court looked to the totality of the circumstances and found insufficient evidence to hold that the hotel owed the plaintiff a duty to protect him from this unforeseeable criminal attack.⁴⁰ Specifically, it found no evidence of any prior incidents or other circumstances that would have alerted the hotel to the resulting criminal act.⁴¹ The court concluded that, to rule in the plaintiff's favor, it would have to hold that a landowner/invitor has an absolute duty to take reasonable care for the protection of its guests—in effect to be an insurer of the guests' safety.⁴² This, the court was unwilling to do.

In dissent, Justice Boehm noted that he did not believe that summary judgment was appropriate on the basis that the hotel owed the plaintiff no duty. Rather, in Justice Boehm's view, every operator of a hotel has a duty to its guests (and its guests' guests) to take reasonable steps to preserve their safety against foreseeable harm.⁴³ Specifically, Justice Boehm found that hotel guests should be able to rely on their host taking reasonable precautions for their protection.⁴⁴ In a concurring opinion, Justice Dickson agreed with Justice Boehm that every hotel operator owes a duty to its guests (and its guests' guests) to take reasonable steps to preserve the safety against foreseeable harm.⁴⁵ He also agreed that the issue of whether it is unreasonable to give out a guest's room number is not subject to blanket resolution, but rather is an issue of fact for trial.⁴⁶ However, Justice Dickson noted these principles, in his view, were not contrary to the court's opinion.⁴⁷

36. See *Ellis v Luxbury Hotels, Inc.*, 666 N.E.2d 1262 (Ind. Ct. App. 1996), *aff'd*, 716 N.E.2d at 359.

37. See *Ellis*, 716 N.E.2d at 360.

38. See *id.* (citing *Rocoff v. Lancella*, 251 N.E.2d 582, 585 (Ind. App. 1969)).

39. See *id.* (citing *Dickison v. Hargitt*, 611 N.E.2d 691, 694 (Ind. Ct. App. 1993)).

40. See *id.* at 361.

41. See *id.*

42. See *id.*

43. See *id.* at 362 (Boehm, J., dissenting).

44. See *id.* (Boehm, J., dissenting).

45. See *id.* (Dickson, J., concurring).

46. See *id.*

47. See *id.*

In *Schrieber v. Walker*,⁴⁸ the United States District Court for the Northern District of Indiana, relying on the Indiana Supreme Court's decision in *Delta Tau Delta*, held that a hotel/condominium complex owed no duty to a guest to protect him from alleged criminal acts of another guest and that the hotel neither gratuitously nor voluntarily assumed a duty of care to protect its guests from criminal acts.⁴⁹

In *Schrieber*, both the plaintiff and the perpetrator were graduates of Culver Military Academy and returned to their alma mater for graduation weekend. Both individuals stayed at the defendant's hotel/condominium complex that hired additional security for graduation weekends to protect its property and patrol the premises.⁵⁰ Following several drinks, the perpetrator punched the plaintiff and severely injured him. Plaintiff subsequently brought an action against the defendant hotel/condominium complex alleging negligence in failing to protect him from the perpetrator's alleged intentional criminal act.⁵¹ The hotel moved for summary judgment on the basis that it owed no duty to protect the plaintiff from the alleged criminal act.⁵²

The federal district court applied the "totality of the circumstances" test in determining whether the criminal act was reasonably foreseeable.⁵³ Although the court recognized that much drinking went on during graduation week, it found that the record contained no evidence of prior violent acts or crimes of violence during graduation week and that nothing in the record approached the indicia of foreseeability found in *Delta Tau Delta*.⁵⁴ Thus, it held that Indiana law created no duty on the hotel's part to take reasonable care to protect the plaintiff from the assailant's alleged criminal act.⁵⁵

The plaintiff next contended that the hotel undertook actions that raised the inference that it assumed the duty to protect its guests against criminal acts of third parties.⁵⁶ The district court recognized that, under Indiana law, a party may gratuitously or voluntarily assume a duty of care.⁵⁷ However, it agreed with the Indiana Court of Appeals' decision in *American Legion Pioneer Post No. 340 v. Christon* that nothing in the record suggests that the hotel, through affirmative conduct or agreement, gratuitously undertook a duty to protect the plaintiff from the unforeseeable alleged criminal act of the assailant.⁵⁸

48. 79 F. Supp.2d 965 (N.D. Ind. 1999).

49. See *id.* at 968.

50. See *id.* at 966.

51. See *id.*

52. See *id.* at 965.

53. *Id.* at 966 (citing *Delta Tau Delta v. Johnson*, 712 N.E.2d 968, 973 (Ind. 1999)).

54. See *id.* at 967 (citing *Delta Tau Delta*, 712 N.E.2d at 973-74).

55. See *id.* at 968.

56. See *id.* at 968-69.

57. See *id.* at 969 (citing *Delta Tau Delta*, 712 N.E.2d at 975; (citing *Plan-Tec., Inc. v. Wiggins*, 443 N.E.2d 1212, 1219 (Ind. Ct. App. 1983))).

58. See *Schrieber*, 79 F. Supp.2d at 969-70 (citing *American Legion Pioneer Post No. 340 v. Christon*, 712 N.E.2d 532, 535 (Ind. Ct. App.), *trans. denied*, 726 N.E.2d 308 (Ind. 1999)).

The Indiana Court of Appeals later applied the totality of the circumstances test enunciated by the Indiana Supreme Court to a case where a spectator at a university football game was injured. In *Hayden v. University of Notre Dame*,⁵⁹ a spectator at a Notre Dame football game sued the university for negligence after she was injured by enthusiastic fellow spectators who lunged for a kicked football not caught by a goalpost net.⁶⁰ Notre Dame moved for summary judgment, arguing that it did not have a legal duty to protect the spectator from the intentional criminal acts of an unknown third person. The trial court granted Notre Dame's motion, and the plaintiff appealed.⁶¹ For purposes of appeal, the court of appeals assumed that the unknown third party's actions in lunging for the football and knocking the plaintiff down constituted a criminal act; although, it did not explain the rationale for this conclusion.⁶²

Relying on the recent Indiana Supreme Court precedent, the court of appeals found that the totality of the circumstances established that Notre Dame should have foreseen that injury would likely result from the actions of a third party in lunging for the football after it landed in the seating area. As a result, it concluded that Notre Dame owed the spectator a duty to protect her from such injury and reversed the trial court's ruling.⁶³ The court reasoned that there was evidence in the record that there were many prior incidents of people being jostled or injured by efforts of fans to retrieve a ball.⁶⁴

The Indiana Supreme Court's adoption of the "totality of the circumstances" test clarified divergent Indiana law governing a landowner's duty to protect invitees against criminal attacks by third parties. Nonetheless, cases in this section of the tort law will continue to be hotly contested given the unique factual circumstances of each case.

B. Premises Liability and the Issue of Duty

1. *Duty to Trespassers—Willful and Wanton Standard.*—In *Taylor v. Duke*,⁶⁵ the Indiana Court of Appeals interpreted the duty of care owed to a trespasser. The plaintiff, a homeless person, was walking behind a store on his way to a bridge under which he usually slept. When it began to rain, he sought shelter under a trailer parked against the backdoor of the store. He was aware that trailers are often attached to tractors and are frequently removed from loading dock areas.⁶⁶ Later that evening, an over-the-road truck driver arrived at the store and proceeded to attach her tractor to the empty trailer. Prior to hooking up the

59. 716 N.E.2d 603 (Ind. Ct. App. 1999), *trans. denied*, No. 71A03-9812-CV-519, 2000 Ind. LEXIS 358 (Ind. Apr. 19, 2000).

60. *See id.* at 604.

61. *See id.*

62. *See id.* at 607 n.1.

63. *See id.* at 606.

64. *See id.*

65. 713 N.E.2d 877 (Ind. Ct. App. 1999).

66. *See id.* at 879.

empty trailer, the driver checked under it for bottles, blocks and other debris. Finding nothing, she backed her tractor up to the empty trailer, connected the two, and drove the unit away from the loading dock.⁶⁷ When the driver subsequently exited the tractor, she discovered that she had run over the sleeping plaintiff.⁶⁸

Plaintiff filed a negligence action against the driver and the store, and the defendants moved for summary judgment. The trial court entered summary judgment in favor of the defendants, holding as a matter of law that the plaintiff was a trespasser on the premises where the incident occurred, that defendants owed the plaintiff only a duty to avoid willfully and wantonly injuring him, and that there was no evidence to support an inference that defendants willfully or wantonly injured the plaintiff.⁶⁹

On appeal, the court noted that the status of a person entering the land of another determines the duty that the landowner or occupier owes to him, but that the driver was neither an owner nor occupier of the property.⁷⁰ However, the court found that “[o]ne who does an act or carries on an activity upon land on behalf of the possessor is subject to the same liability, and enjoys the same freedom from liability for physical harm caused thereby to others upon and outside the land as though he was the possessor of the land.”⁷¹ Because it determined that the defendant driver had a written agreement for carrier services with the store, was clearly acting by the direction, consent and authority of the store, and was acting on behalf of the store, the court found that she was subject to the same liability, or freedom from liability, for physical harm caused to others upon the land as the store.⁷²

Plaintiff argued that he was an invitee on the store’s premises and that defendants therefore owed him a duty of reasonable care for his protection. The appellate court disagreed, finding that the plaintiff entered the store’s premises for his own convenience, not for the purpose for which the premises are held open to the public.⁷³ Further, it found that he entered the premises without the store’s permission or sufferance.⁷⁴ Accordingly, the court determined that the plaintiff was a trespasser to whom defendants owed a duty only to refrain from willfully or wantonly injuring.⁷⁵

The court of appeals acknowledged that wanton and willful conduct consists of either: (1) an intentional act done with reckless disregard of the natural and probable consequences of injury to a known person under the circumstances

67. *See id.*

68. *See id.*

69. *See id.*

70. *See id.* at 880 (citing *Frye v. Trustees of the Rumbletown Free Methodist Church*, 657 N.E.2d 745 (Ind. Ct. App. 1995)).

71. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 383 (1965)).

72. *See id.* at 881.

73. *See id.*

74. *See id.*

75. *See id.*

known to the actor at the time; or (2) an omission or failure to act when the actor has actual knowledge of the natural and probable consequence of injury and has opportunity to avoid that risk.⁷⁶ This conduct is comprised of two elements: (1) the defendant's knowledge of an impending danger or consciousness of misconduct calculated to result in probable injury; and (2) the defendant's conduct must have exhibited an indifference to the consequences of the act.⁷⁷ The court further acknowledged that willful or wanton misconduct is "so grossly deviant from everyday standards that the licensee or trespasser cannot be expected to anticipate it."⁷⁸

Applying this law to the facts, the court of appeals found that none of the designated evidence raised a genuine issue or inference that defendants acted willfully or wantonly.⁷⁹ Specifically, the plaintiff designated no evidence that defendants had knowledge of an impending danger or consciousness of misconduct calculated to result in probable injury, or that their conduct exhibited an indifference to the consequences of the act.⁸⁰ Further, the plaintiff designated no evidence that defendants' conduct was so grossly deviate from everyday standards that the plaintiff could not have been expected to anticipate it. Rather, the designated evidence revealed that the plaintiff was aware that trailers were often attached to tractors and removed from loading dock areas. Accordingly, the court of appeals affirmed the trial court's entry of summary judgment in favor of the defendants.⁸¹

2. *Independent Contractors*.—During the course of this survey period, the Indiana Court of Appeals handed down several decisions interpreting the liability of an independent contractor following the acceptance of its work by a contractor. In *Jacques v. Allied Building Services of Indiana, Inc.*,⁸² Allied had contracted with a store owner to provide floor maintenance. Plaintiff slipped and fell in the interior lobby of the store after making several purchases. The store's co-manager inspected the area where the plaintiff fell and determined that it was clean and dry.⁸³ However, he detected a slick spot with his foot which he believed may have had "slick wax."⁸⁴ On these facts, the plaintiff brought suit against Allied claiming that it was liable for injuries sustained in her fall. Allied moved for summary judgment, claiming that it owed no duty to the plaintiff as a matter of law because the store had accepted its work. The trial court agreed and granted Allied's motion for summary judgment, and the plaintiff appealed

76. See *id.* at 882 (citing *Witham v. Norfolk & Western Ry. Co.*, 561 N.E.2d 484, 486 (Ind. 1990); *Nesvig v. Town of Porter*, 668 N.E.2d 1276, 1283 (Ind. Ct. App. 1996)).

77. See *id.*

78. *Id.* (citing *Harper v. Kamp Schaefer*, 549 N.E.2d 1067, 1070 (Ind. Ct. App. 1990)).

79. See *id.*

80. See *id.*

81. See *id.*

82. 717 N.E.2d 606 (Ind. Ct. App. 1999).

83. See *id.* at 607.

84. *Id.*

the decision.⁸⁵

On appeal, Allied argued that it owed no duty to the plaintiff because its work had been accepted by the store. The court noted that, generally, contractors do not owe a duty of care to third parties after the owner has accepted the work.⁸⁶ Thus, evidence of an independent contractor's mere negligence is typically insufficient to impose liability against the contractor after acceptance of the work by the general contractor or owner.⁸⁷

Plaintiff argued that a material issue of fact existed as to whether the store accepted Allied's work. In analyzing this issue, the Indiana Court of Appeals looked to the Indiana Supreme Court's decision in *Blake v. Calumet Construction Corp.*, which established a test for determining whether acceptance of an independent contractor's work has taken place by focusing on whether the owner was better able to prevent injury to third parties at the time the harm occurred.⁸⁸ Factors in the acceptance inquiry include whether: (1) the owner or its agent reasserted physical control over the premises or instrumentality; (2) the work was actually completed; (3) the owner expressly communicated an acceptance or release of liability; or (4) the owner's actions permit a reasonable inference that the work was accepted.⁸⁹ The court determined that Allied never had physical control of the store's premises, but continued to assert the control that it did have—responsibility for maintenance of the sales floor—and never relinquished that responsibility to the store.⁹⁰ The work was not completed because it was provided under an agreement to perform regularly scheduled cleaning and on-demand service. Therefore, the court concluded that the store never expressly communicated an acceptance to Allied.⁹¹

In response, Allied argued that this case is analogous to the case of *Lynn v. Hart*.⁹² The court of appeals noted that, in *Lynn*, the quality of the contractor's work and the condition of the premises were easily ascertainable. This, in addition to evidence that the owner did examine the parking lot, permitted the reasonable inference that the owner had accepted the work.⁹³ In this case, however, a visual inspection of the floor would not have revealed its condition. Further, there was no evidence that any particularized inspection of the floor was done beyond the general manager's "walk through" inspection of the store as a whole. Thus, the court found that acceptance of Allied's work was not the only

85. See *id.* at 607-08.

86. See *id.* (citing *Blake v. Calumet Constr. Corp.*, 674 N.E.2d 167, 170 (Ind. 1996)); *Hill v. Rieth-Riley Constr. Co.*, 670 N.E.2d 940, 944 (Ind. Ct. App. 1996); *Lynn v. Hart*, 565 N.E.2d 1162, 1163 (Ind. Ct. App. 1991).

87. See *Jacques*, 717 N.E.2d at 609 (citing *Snider v. Bob Heinlin Concrete Constr. Co.*, 506 N.E.2d 77, 82 (Ind. Ct. App. 1987)).

88. See *Blake*, 674 N.E.2d at 171.

89. See *Jacques*, 717 N.E.2d at 609 (citing *Blake*, 674 N.E.2d at 171).

90. See *id.*

91. See *id.*

92. 565 N.E.2d 1162 (Ind. Ct. App. 1991).

93. See *id.* at 1164.

reasonable inference that could be drawn from the facts.⁹⁴ Accordingly, it reversed the trial court's entry of summary judgment in favor of Allied.⁹⁵

In *Ross v. State*,⁹⁶ the Indiana Court of Appeals likewise interpreted exceptions to the general rule in Indiana that an independent contractor does not owe a duty of care to third parties after the owner has accepted the contractor's work.⁹⁷ In *Ross*, a contractor contracted within the Indiana Department of Transportation ("INDOT") to provide labor and materials to perform road resurfacing.⁹⁸ Approximately five months after INDOT accepted the contractor's work, the plaintiff encountered a left curve containing a dip or low spot which forced his vehicle to cross the center line of the road and strike a mud bank. The plaintiff filed a complaint against the contractor and INDOT, and the trial court subsequently entered summary judgment in favor of the defendants.⁹⁹

On appeal, the plaintiff contended that the trial court erred in granting summary judgment because there were genuine issues of material fact relating to whether the contractor was immune from liability, even after its work was accepted by INDOT.¹⁰⁰ The court of appeals began its discussion by noting that an exception to the general rule of independent contractor non-liability imposes liability on the contractor after the acceptance of the work where the contractor turns over the work "in a condition that was dangerously defective, inherently dangerous, or imminently dangerous such that it created a risk of imminent personal injury."¹⁰¹ However, any such liability established under this exception is limited where the contractor has merely followed plans provided by the contractee/owner. This limitation has been stated as follows: "[T]he contractor is not liable if he has merely carried out the plans, specifications, and directions given him, since in that case the responsibility is assumed by the employer, at least when the plans are not so obviously dangerous that no reasonable contractor would follow them."¹⁰² Thus, where a contractor is not following their own plans for the work, but those provided by the contractee, liability is imposed only where the plans are so obviously defective that no reasonable contractor would follow them.¹⁰³

In response, the plaintiff asserted that the designated evidence created a genuine issue of fact as to whether the contractor's failure to correct the adverse superelevation in the road left the work in an imminently dangerous condition such that it created a risk of imminent personal injury. The appellate court

94. See *Jacques*, 717 N.E.2d at 610.

95. See *id.*

96. 704 N.E.2d 141 (Ind. Ct. App. 1998).

97. See *Blake v. Calumet Constr. Corp.*, 674 N.E.2d 167, 170 (Ind. 1996).

98. See *Ross*, 704 N.E.2d at 143.

99. See *id.*

100. See *id.* at 143-44.

101. *Id.* at 144 (citing *Blake*, 674 N.E.2d at 172-73).

102. *Id.* at 144-45 (citations omitted).

103. See *id.* at 145 (citing *Davis v. Henderlong Lumber Co.*, 221 F. Supp. 129, 134 (N.D. Ind. 1963) (applying Indiana law)).

disagreed, finding that the work performed by the contractor did not create the defect in the curve.¹⁰⁴ The defect in the road existed prior to the contractor beginning its work, and the contractor merely added a layer of material to the existing road.¹⁰⁵ As a result, the court found that nothing in the contractor's work directly created the alleged dangerous condition.¹⁰⁶ In addition, the court found that even if the contractor's correction of the adverse superelevation was to be considered part of its "work," it concluded that, as a matter of law, it was not imminently dangerous.¹⁰⁷ It noted that in the context of independent contractor liability, a danger is imminent where it is likely to cause injury, rather than creating the mere possibility of injury.¹⁰⁸ Further, an instrumentality may be imminently dangerous where it is of "such a nature that danger in its use is imminent, that is, its use for the purpose for which is it intended is fraught with immediate peril, [and] carries the threat of serious immediate danger."¹⁰⁹ Although the court acknowledged that the plaintiff designated an affidavit of a civil engineer who concluded that the curve contained an adverse superelevation that made the design speed of the curve less than the posted speed limit, this affidavit did not support the conclusion that the curve was *imminently dangerous*.¹¹⁰ Likewise, the court found that because the curve is not always dangerous and poses a problem only to some types of vehicles that navigate the curve in a particular manner, the defect in the curve was not "imminently dangerous."¹¹¹

The court further concluded that the contractor had no liability because it merely followed INDOT's plans.¹¹² Plaintiffs responded that the designated evidence created a genuine issue of material fact as to whether INDOT's plans for the resurfacing project were so obviously defective and dangerous that no reasonable contractor would follow them. The court acknowledged that plans that fail to correct a dangerous defect obvious to the contractor may possibly fall within this exception to the rule on contractor liability.¹¹³ However, it noted that it was clear from the designated evidence that the contractor was reasonable in relying upon INDOT's engineers to correctly calculate and post the correct speed limit for the curve.¹¹⁴ Therefore, the court concluded that even if the designated

104. *See id.*

105. *See id.*

106. *See id.*

107. *Id.*

108. *See id.* (citing *Snider v. Bob Heinlin Concrete Constr. Co.*, 506 N.E.2d 77, 82 (Ind. Ct. App. 1987)).

109. *Id.* (citing *National Steel Erection v. Hinkle*, 541 N.E.2d 288, 293 (Ind. Ct. App. 1989)).

110. *See id.*

111. *Id.* at 146; *see also Blake v. Calumet Constr. Corp.*, 674 N.E.2d 167, 173 (Ind. 1996); *Hill v. Rieth-Riley*, 670 N.E.2d 940, 945 (Ind. Ct. App. 1996).

112. *See Ross*, 704 N.E.2d at 147.

113. *See id.*

114. *See id.* (citing *National*, 541 N.E.2d at 294 which held that a contractor was justified in relying upon the experience and skill of the architect and supervising engineer in the installation

evidence indicated that the contractor should have been aware that the posted speed limit was too high for the curve, it would be reasonable for it to rely upon INDOT's protected decision not to change the speed limit.¹¹⁵

Both the Indiana Supreme Court and the court of appeals also rendered decisions concerning the general rule of a principal's nonliability for the negligence of an independent contractor during this survey period. In *Carie v. PSI Energy, Inc.*,¹¹⁶ a contractor's employees sued PSI for injuries sustained during the use of a non-self-supporting fixture to remove an exhaust cover during maintenance work on a generating station.¹¹⁷ PSI moved for summary judgment, which the trial court granted, based on the general rule that a person who hires an independent contractor is not liable for the independent contractor's negligence. Applying an exception to the general rule of non-liability, the Indiana Court of Appeals reversed, with Judge Friedlander dissenting.¹¹⁸ PSI, in its petition to transfer, presented one dispositive issue: whether the "due precaution" exception to the general rule of non-liability applies to this case.¹¹⁹

The supreme court began its discussion by noting the longstanding general rule that a principal is not liable for the negligence of an independent contractor.¹²⁰ Indiana courts, however, have recognized the following five exceptions to the general rule: (1) where the contract requires the performance of intrinsically dangerous work; (2) where the principal is, by law or contract, charged with performing the specific duties; (3) where the act will create a nuisance; (4) where the act to be performed will probably cause injury to others unless due precaution is taken; and (5) where the act to be performed is illegal.¹²¹ These exceptions reflect the notion that, in certain circumstances, "the employer is in the best position to identify, minimize, and administer the risks involved in the contractor's activities."¹²²

The supreme court agreed with the court of appeals that the due precaution exception makes an employer "liable" for the negligence of an independent contractor where the act to be performed will probably cause injuries to others unless due precaution is taken.¹²³ In *Bagley*, the supreme court explained the exception as follows:

The essence of this exception is the foreseeability of the peculiar risk involved in the work and of the need for special precautions. The

of a fume hood in a chemical laboratory).

115. See *id.* at 148.

116. 715 N.E.2d 853 (Ind. 1999).

117. See *id.* at 854-55.

118. See *id.* at 856 (citing *Carie v. PSI Energy, Inc.*, 694 N.E.2d 729, 737-38 (Ind. Ct. App. 1998), *aff'd in part and vacated in part*, 715 N.E.2d at 853).

119. *Id.* at 855.

120. See *id.* (citing *Bagley v. Insight Communications Co.*, 658 N.E.2d 584, 586 (Ind. 1995)).

121. See *id.*

122. *Id.* (citing 7 AM. JUR. 3D *Proof of Facts* § 1, at 483 (1990)).

123. *Id.* at 856 (citing *Carie*, 694 N.E.2d at 735).

exception applies where, at the time of the making of the contract, a principal should have foreseen that the performance of the work or the conditions under which it was to be performed would, absent precautionary measures, probably cause injury.

Application of this fourth exception to the plaintiff's claim thus requires an examination of whether, at the time [a party] was employed as an independent contractor, there existed a peculiar risk which was reasonably foreseeable and which recognizably called for precautionary measures.¹²⁴

With these standards in mind, and the relevant facts undisputed, the supreme court found that the inquiry becomes whether, as a matter of law, PSI should have foreseen that the performance of maintenance work on the exhausters would probably result in this type of incident unless due precaution was taken.¹²⁵ This determination hinged on the degree of factual specificity which the law should require the employer to foresee. The court of appeals majority decided that the due precaution exception applied because PSI should have foreseen the general risk which caused the plaintiff's injuries.¹²⁶ In dissent, Judge Friedlander asserted that the exception should apply only if there were some relatively more peculiar or special foreseeable risk.¹²⁷ The supreme court agreed with Judge Friedlander that "the danger that the contractee must foresee in order to fit within the fourth exception must be substantially similar to the accident that produced the complained-of injury."¹²⁸ Based on the designated evidence, the supreme court was satisfied that PSI could not have foreseen the sequence of events leading to the plaintiff's injuries, and as such held that the due precaution exception did not apply.¹²⁹

In a similar decision, *Ryobi Die Casting v. Montgomery*,¹³⁰ the Indiana Court of Appeals found that the focus of the fourth exception to the general rule of non-liability for the torts of independent contractors is on the act to be performed, not the skill level of the contractor.¹³¹ Thus, the court held that, in applying this exception, it would not consider the level of skill or experience of the independent contractor, only the risk involved in the performance of the work.¹³²

In *McDaniel v. Business Investment Group, Ltd.*,¹³³ the Indiana Court of

124. *Carie*, 715 N.E.2d at 856.

125. *See id.* at 857.

126. *See Carie*, 694 N.E.2d at 736-37.

127. *See id.* at 737 (Friedlander, J., dissenting).

128. *Carie*, 715 N.E.2d at 857 (quoting *Carie*, 694 N.E.2d at 737 (Friedlander, J., dissenting)).

129. *See id.* at 858.

130. 705 N.E.2d 227 (Ind. Ct. App.), *trans. denied*, 726 N.E.2d 298 (Ind. 1999) (mem.).

131. *See id.* at 229.

132. *See id.* at 230.

133. 709 N.E.2d 17 (Ind. Ct. App.), *trans. denied*, 726 N.E.2d 298 (Ind. 1999) (mem.).

Appeals interpreted the "peculiar risk" language of the due precaution exception to the general rule of non-liability for the torts of independent contractors. The court held that although "peculiar risk" has not been defined previously, the phrase refers to the risk of a particularized harm specific to the work being performed or the conditions under which it is performed.¹³⁴ Accordingly, the court found that the fourth exception to the general rule applies only when the risk involved is something more than the routine and predictable hazards generally associated with a given occupation.¹³⁵ Rather, it must be a risk unique to the circumstances of a given job. In addition, the actual injury sustained must result from the particularized harm identified by the risk.¹³⁶

In *McDaniel*, an employee of a water and sewer contractor was killed after a cave-in occurred while he was performing trenching work as part of the repair of an underground sewer line. The estate's administrator sued the plumbing contractor which had an oral agreement with the water and sewer contractor for performance of the underground work.¹³⁷ Applying the aforementioned standard, the Indiana Court of Appeals found that a cave-in does not represent a peculiar risk of trenching.¹³⁸ Relevant statistics demonstrate that cave-ins are a routine and predictable hazard of trenching, and there was no evidence that the decedent's job involved a risk of cave-in that was somehow unique or distinguishable from the general risk of cave-ins associated with trenching.¹³⁹ Because the due precaution exception only contemplates that independent contractors will be held responsible for anticipating and guarding against unique or distinguishable dangers, the court of appeals affirmed the trial court's grant of summary judgment in favor of the defendant.¹⁴⁰

3. *Golf Course Liability*.—In *Lincke v. Long Beach Country Club*,¹⁴¹ a golfer standing in the rough was injured by a ball hit by a golfer playing on an adjacent hole. The injured golfer sued the country club for failure to maintain its golf course in a reasonably safe condition. The club moved for summary judgment, arguing that it took remedial measures to address safety concerns about the two holes.¹⁴² Specifically, the club designated evidence that it had hired a golf course architect to suggest corrections for a drainage problem and that the architect's recommendations had been implemented. Based on this evidence, the club claimed that it had no reason to know or suspect that any dangerous condition remained.¹⁴³

Although the Indiana Court of Appeals acknowledged both the scarcity of

134. *Id.* at 22.

135. *See id.*

136. *See id.* (citing *Red Roof Inns, Inc. v. Purvis*, 691 N.E.2d 1341 (Ind. Ct. App. 1998)).

137. *See id.* at 20.

138. *See id.*

139. *See id.*

140. *See id.* at 22.

141. 702 N.E.2d 738 (Ind. Ct. App. 1998), *trans. denied*, 714 N.E.2d 117 (Ind. 1999).

142. *See id.* at 739.

143. *See id.*

Indiana law in claims against golf courses and the references in the parties' supporting briefs to decisions by other jurisdictions, the court chose to rest its decision on the Indiana Supreme Court decision in *Douglass v. Irvin*.¹⁴⁴ In *Douglass*, the supreme court held that a

landowner is liable for harm caused to an invitee by a condition on the land only if the landowner (1) knows of or through the exercise of reasonable care would discover the condition and realize it involves an unreasonable risk of harm to such invitees; (2) should expect that the invitee will fail to discover or realize the danger or fail to protect against it; and (3) fails to exercise reasonable care in protecting the invitee against the danger.¹⁴⁵

Thus, the "determination of whether a landowner breached its duty of care to an invitee centers on an objective evaluation of the landowner's knowledge."¹⁴⁶ After reviewing the designated evidence, the court determined that although there were general statements of criticism concerning the configuration of the holes, there was no express statement that the holes were dangerous.¹⁴⁷ Moreover, there was no designated evidence that critical sentiments about the configuration of the holes had been expressed to the club or any recommendations made to the club about possible changes. Accordingly, the Indiana Court of Appeals determined that the plaintiff's response to the club's motion for summary judgment failed to meet his burden of setting forth specifically designated facts regarding a breach of duty by the club.¹⁴⁸

4. *Control of Premises*.—In *Helton v. Harbrecht*,¹⁴⁹ a property owner's mother sustained injuries while visiting the construction site of her son's future home. Prior to the date of the injury, the plaintiff's son contracted with defendant for the construction of the home. At the time of the injury, the house was in the latter stages of the framing process and the defendant's employees had temporarily moved to another job site.¹⁵⁰ The plaintiff went to the construction site to show friends the frame of the home, and attempted to climb a ladder in place in the interior of the house leading to the second level. On her descent, the plaintiff fell off the ladder and sustained injury.¹⁵¹

Plaintiff alleged that defendant was in control of the construction site on the date of her injuries and that defendant's negligence caused her injuries. Specifically, she argued that defendant was negligent in failing to properly secure

144. 549 N.E.2d 368 (Ind. 1990).

145. *Lincke*, 702 N.E.2d at 740 (citing *Douglass*, 549 N.E.2d at 370).

146. *Id.*

147. *See id.*

148. *See id.*

149. 701 N.E.2d 1265 (Ind. Ct. App. 1998), *trans. denied*, 714 N.E.2d 171 (Ind. 1999) (mem.).

150. *See id.* at 1266.

151. *See id.*

the work site by leaving the ladder at the site.¹⁵² Defendant moved for summary judgment on the grounds that it was not in control of the premises at the time of the plaintiff's fall and therefore owed her no duty.¹⁵³

In opposing summary judgment, the plaintiff relied on a recent Indiana Court of Appeals decision that found that a factual issue existed regarding control of a partially constructed home. In *Carroll v. Jagoe Homes, Inc.*,¹⁵⁴ a child was injured when he fell through insulation in a house under construction. The child and his mother brought suit against the property owners and contractor, and the property owners moved for summary judgment arguing that they had nothing to do with the construction of the home and therefore owed no duty to those coming into the property.¹⁵⁵ On appeal, the court relied on the Indiana Supreme Court decision in *Risk v. Schilling*.¹⁵⁶ In that case, the court held that "[o]nly a party who exerts control over the premises owes a duty to persons coming onto the premises."¹⁵⁷ Turning to the case before it, the court of appeals in *Helton* found that it was undisputed that defendant acted as the general contractor for the job, and as such, performed many roles and undertook many responsibilities.¹⁵⁸ However, it further found that no employees of defendant were physically at the job site on the date of the accident and had been away from the job site for approximately one month. Moreover, it found that at the time of the accident the owner of the property, the plaintiff's son, was completing electrical work in the house.¹⁵⁹ Although the court found conflicting facts regarding the ownership of the ladder, it held that the evidence was undisputed as to defendant's exercise of control over the premises at the time of the accident.¹⁶⁰ Specifically, it held that the plaintiff's son, the homeowner, was in control of the construction site when his mother asked for permission to come on the site and when she fell.¹⁶¹ Accordingly, the court held that defendant did not exert control over the premises at the time of the plaintiff's injury and therefore owed no duty to her.¹⁶²

152. See *id.* at 1267.

153. See *id.*

154. 677 N.E.2d 612 (Ind. Ct. App.), *trans. denied*, 690 N.E.2d 1181 (Ind. 1997).

155. See *id.*

156. 569 N.E.2d 646 (Ind. 1991).

157. *Helton*, 701 N.E.2d at 1267-68 (quoting *Risk*, 569 N.E.2d at 648).

158. See *id.* at 1268.

159. See *id.*

160. See *id.*

161. See *id.* at 1266.

162. See *id.* (citing *Risk*, 569 N.E.2d at 648) (only a party who asserts control over the premises owes a duty to persons coming onto the premises).

C. Recreational Use Statute

In *Civils v. Stucker*,¹⁶³ a child, through his parents, brought a personal injury action against a landowner, seeking recovery for injuries he sustained while riding on an intertube pulled by an automobile on the defendant landowner's driveway. The landowner filed a motion for summary judgment arguing that Indiana's Recreational Use Statute provided immunity and that the plaintiff incurred the risk of his injury.¹⁶⁴ The trial court found that the plaintiff was a licensee on the property, but could not conclude that Indiana's Recreational Use Statute was applicable.¹⁶⁵

The Indiana Court of Appeals agreed with the trial court that the plaintiff was a licensee at the time of the accident.¹⁶⁶ Licensees have a license to use the land and are privileged to enter or remain on the land by virtue of the permission or sufferance of the owner or occupier.¹⁶⁷ They enter the land of another for their own convenience, curiosity or entertainment and take the premises as they find them.¹⁶⁸ The court further found that the Indiana Recreational Use Statute applies in this case to licensees and trespassers but not invitees.¹⁶⁹

In response, the plaintiff argued on appeal that riding an intertube being pulled by an automobile is a reckless activity not covered by the Indiana Recreational Use Statute.¹⁷⁰ The land owner countered that sledding is an activity contemplated by the statute.¹⁷¹ The court agreed with the landowner that normal sledding is an activity of the same kind or class as those specifically designated in the Recreational Use Statute.¹⁷² Specifically, the court found that the "for any other purpose" language makes it clear the list of enumerated activities was not intended by the legislature to be exhaustive.¹⁷³

The court of appeals did note, however, that the statute does not address the manner in which an activity is undertaken, only the type or purpose of the activity.¹⁷⁴ Nevertheless, it concluded that while the plaintiff was riding the intertube behind the automobile he was engaged in a recreational use, albeit in an arguably reckless manner.¹⁷⁵ Therefore, the defendant landowner was entitled

163. 705 N.E.2d 524 (Ind. Ct. App. 1999).

164. *See id.* at 526.

165. *See id.*

166. *See id.* at 527.

167. *See id.* (citing *McCormick v. State*, 673 N.E.2d 829, 836 (Ind. Ct. App. 1996)).

168. *See id.*

169. *See* IND. CODE § 14-22-10-2 (1998).

170. *See id.*

171. *See id.*

172. *See Civils*, 705 N.E.2d at 527 (citing *Kelly v. Ladywood Apartments*, 622 N.E.2d 1044, 1048 (Ind. Ct. App. 1993)).

173. *See id.*

174. *See id.*

175. *See id.*

to immunity under the statute.¹⁷⁶

The court of appeals again addressed the Indiana Recreational Use Statute in *Cunningham v. Bakker Produce, Inc.*¹⁷⁷ There, the parents of a six year old child sued the owner of a parcel of unimproved land for injuries to their child as he attempted to help other children clear a tree limb for a baseball game. The defendant property owner had hired a tree removal service to remove limbs from a tree on the unimproved property and directed them to cut the limbs and leave them where they fell.¹⁷⁸ The defendant intended to remove the tree limbs, but did not do so for approximately one week. During this time, a group of children went to the property to play baseball as they had in the past. The children discovered that one of the limbs was left on the base path that they traditionally used, and attempted to remove the limb.¹⁷⁹ As this was being attempted, the plaintiffs' son slipped and fell underneath the limb, which then fell from his brother's arms and fracturing the plaintiff's son's skull. The plaintiffs brought a personal injury action, and defendant subsequently filed a motion for summary judgment alleging that the Indiana Recreational Use Statute shielded him from liability.¹⁸⁰ The trial court granted defendant's motion on the basis that the plaintiffs' son was a licensee "at most" and that defendant was thus protected by the Recreational Use Statute. The trial court further held that the attractive nuisance exception statute did not apply to this case.¹⁸¹

On appeal, the plaintiffs argued that: (1) the statute does not protect landowners from suit regarding injuries caused by their own negligence, but rather protects them from the acts of third persons; (2) the children's use of defendant's field to play baseball was not an activity similar to the Statute's listed uses, and, therefore, the Recreational Use Statute did not apply; and (3) even if the Recreational Use Statute applied, there is a question of fact regarding the applicability of the attractive nuisance exception.¹⁸²

With respect to whether the Recreational Use Statute excuses a landowner's own negligence, the plaintiffs pointed to the statutory language that a landowner is not liable under the Statute for "an act or failure to act of other persons using the premises," and asserted the Statute does not protect landowners from their own negligence.¹⁸³ The court of appeals noted that the purpose of the Recreational Use Statute is to encourage landowners to open their property to the public for recreational purposes free of charge.¹⁸⁴ It further noted that the statute does not create immunity from liability for the premises owner with regard to his

176. *See id.*

177. 712 N.E.2d 1002 (Ind. Ct. App.), *trans. denied*, 726 N.E.2d 308 (1999) (mem.).

178. *See id.* at 1004.

179. *See id.*

180. *See id.*

181. *See id.*

182. *See id.* at 1004-05.

183. *Id.* at 1005 (quoting IND. CODE § 14-22-10-2(e) (1998)).

184. *See id.* (citing *McCormick v. State*, 673 N.E.2d 829, 833 (Ind. Ct. App. 1996)).

own actions.¹⁸⁵ However, the court found that the designated evidence compelled the conclusion that the acts of the other children, third persons in relation to the victim and the landowner, caused the injuries giving rise to the lawsuit.¹⁸⁶ Although the court stated that it did not want to minimize the very unfortunate injuries suffered by the child, it noted that it is liability precisely for these types of tragic events from which the landowner is protected under the Indiana Recreational Use Statute.¹⁸⁷ Defendant tolerated the public's use of his vacant lot, and it was this sufferance that the Recreational Use Statute was designed to encourage.¹⁸⁸

The plaintiffs next contended that baseball is not an activity in the same category as those set forth by the Recreational Use Statute.¹⁸⁹ However, the court disagreed on the basis of the phrase "for any other purpose" found in the Recreational Use Statute following the specifically listed activities. The court applied the principle of *egusdem generis*, which maintains that "where words of specific and limited signification in a statute are followed by general words of more comprehensive import, the general word shall be construed as embracing only such persons, places, and things as are of like kind or class to those designated by the specific words, unless the contrary intention is clearly shown by the statute."¹⁹⁰ The court concluded that the principal of *egusdem generis* does not require it to split categories so finely or so arbitrarily and held that baseball falls into a category with other outdoor recreational activities such as sledding and boating and that the Recreational Use Statute applies to the case.¹⁹¹

Finally, the court of appeals held that the attractive nuisance doctrine was inapplicable.¹⁹² The attractive nuisance doctrine recognizes that a child may be incapable of understanding and appreciating the dangers that the child may encounter on a landowner's premises.¹⁹³

The doctrine applies where several elements are met: (1) the problem complained of must be maintained or permitted upon the property by the owner; (2) it must be peculiarly dangerous to children, and of such a nature that they will not comprehend the danger; (3) it must be particularly attractive to children; (4) the owner must have actual or constructive knowledge of the condition, and that children do or are likely to trespass, and to be injured; and (5) the injury must be a foreseeable result of the wrong. The doctrine is limited to cases where

185. *See id.*

186. *See id.*

187. *See id.* at 1066.

188. *See id.* at 1005 (citing *McCormick*, 673 N.E.2d at 833).

189. *See id.* at 1003.

190. *Id.* at 1002 (citing *Drake by Drake v. Mitchell Community Schs.*, 649 N.E.2d 1027, 1029 (Ind. 1995)).

191. *See id.*

192. *See id.* at 1007.

193. *See id.* at 1006 (citing *Carroll by Carroll*, 677 N.E.2d at 617).

the danger is latent, [and] does not apply to conditions, natural or artificial, which are common to nature.¹⁹⁴

In *Cunningham*, the condition at issue was limbs lying in a field. The court found that it did not matter whether the limbs fell or were cut down because the attractive nuisance doctrine did not apply to either natural or artificial conditions found in nature.¹⁹⁵ Because a limb on the ground is a condition commonly found in nature, the court held that the attractive nuisance doctrine did not apply.¹⁹⁶

D. Comparative Fault Act

In *Tate v. Cambridge Commons Apartment*,¹⁹⁷ a delivery person who was injured when he slipped and fell on an ice covered walkway while delivering drywall to an apartment complex, sued the owner of the complex for negligence. The plaintiff had gone to the apartment complex following a large ice storm and noticed that the sidewalks were all clear with the exception of an ice-covered sidewalk leading to the laundry room.¹⁹⁸ Plaintiff was given a key to the laundry room by the apartment's maintenance supervisor, who considered the ice to be dangerous that day but did not personally salt the sidewalk and did not advise the plaintiff of alternate routes. After obtaining the key, the plaintiff successfully carried one sheet of drywall over the slick ice-covered sidewalk.¹⁹⁹ Plaintiff perceived the slickness of the sidewalk on his first trip; however, he proceeded to return to his truck and obtain another sheet of drywall. As he was walking on the sidewalk a second time he slipped and fell and was injured.²⁰⁰

The apartment complex moved for summary judgment arguing that it did not breach any duty owed to the plaintiff because it was not required to protect an invitee from dangers of which he was fully aware, yet consciously disregarded. The trial court entered summary judgment in favor of the defendant, and the plaintiff appealed.²⁰¹

Plaintiff initially argued that sections 343 and 343(A) of the Restatement (Second) of Torts, which sets forth the duty of care a possessor of land owes to an invitee, has been superseded by the enactment of the Comparative Fault Act.²⁰² Specifically, he asserted that these sections of the Restatement are akin to defenses such as contributory negligence and incurred risk, which are contrary to the Comparative Fault Act.²⁰³ The court of appeals found that while it had not directly confronted this issue, the persistent application of sections 343 and

194. *Id.* at 1006-07.

195. *See id.* (citing *Kelly*, 622 N.E.2d at 1048-49).

196. *See id.*

197. 712 N.E.2d 525 (Ind. Ct. App. 1999), *trans. denied*, 726 N.E.2d 310 (1999) (mem.).

198. *See id.* at 526.

199. *See id.*

200. *See id.*

201. *See id.*

202. *See id.* at 527.

203. *See id.*

343(A) in premises liability cases since Indiana's enactment of the Comparative Fault Act implicitly recognized the continued viability of these sections as part of common law.²⁰⁴ Moreover, the court found that the plaintiff's argument failed to recognize that where there is no breach of duty, there is no liability and, therefore, there is no fault to be compared.²⁰⁵ The court noted that sections 343 and 343(A) are used to analyze whether a landowner's duty to keep his property in a reasonably safe condition for invitees has been breached and concluded that the issue of whether a duty has been breached is a prerequisite to liability, regardless of the availability of defenses, and must necessarily be determined before one can reach the issue of comparative fault.²⁰⁶ Thus, the court explicitly held that sections 343 and 343(A) have survived Indiana's adoption of the Comparative Fault Act.²⁰⁷

Plaintiff alternatively argued that even if sections 343 and 343(A) apply, a question of fact remained as to whether defendant breached the duty it owed him as an invitee. Essentially, the plaintiff contended that defendant should have reasonably expected that he would have proceeded to encounter the known danger, the ice covered sidewalk, without taking any precautions because he had a job to do. The court of appeals disagreed, noting that actions may be involuntary when "there is no reasonable opportunity to escape from [the danger] or where the exposure is the result of influence, circumstances or surroundings which are a real inducement to continue despite the danger."²⁰⁸ Applying this law to the facts in issue, the court stated that while it recognized that sometimes the argument that "I have a job to do" is persuasive, the plaintiff did not encounter the type of "strong, external compelling circumstances" necessary for recovery under this theory of liability.²⁰⁹ Specifically, the designated evidence did not reveal any sort of ultimatum given to the plaintiff by defendant that he deliver the drywall immediately or lose his job or evidence that the plaintiff unsuccessfully complained about the conditions or that this was the only path he could have taken to the laundry room.²¹⁰

In *Hopper v. Carey*,²¹¹ the Indiana Court of Appeals was presented with the issue of whether the seatbelt defense is admissible to demonstrate fault under the common law defense of contributory negligence or the Indiana Comparative Fault Act.²¹² The plaintiffs were the driver and passengers of a fire truck which overturned after it left the road. Contrary to the department's rules, none of the occupants were wearing seatbelts at the time of the accident. The plaintiffs filed

204. See *id.* (citations omitted).

205. See *id.*

206. See *id.*

207. See *id.* at 528 (citing *Douglass v. Irvin*, 549 N.E.2d 368, 370 (Ind. 1990)) (explaining the difference between this inquiry and that involved in establishing the defense of incurred risk).

208. *Id.* (citing *Ooms v. USX Corp.*, 661 N.E.2d 1250 (Ind. Ct. App. 1996)).

209. *Id.* (quoting *Ooms*, 661 N.E.2d at 1255).

210. See *id.* at 528-29.

211. 716 N.E.2d 566 (Ind. Ct. App. 1999).

212. See *id.* at 569.

a complaint seeking damages for personal injuries.²¹³ Defendant subsequently filed a motion in limine requesting an order that "evidence of [plaintiffs'] failure to wear seat belts is admissible to demonstrate 'fault' on the part of the plaintiff."²¹⁴ Following a hearing, the trial court granted the motion, holding that evidence of the plaintiffs' failure to use a seatbelt is admissible to determine fault.²¹⁵

On appeal, the court noted that the validity of the seatbelt defense has been hotly contested in courts across the country.²¹⁶ The court then went through a lengthy summary of the history of the seatbelt defense in Indiana, focusing on the Indiana Supreme Court decision in *State v. Ingram*,²¹⁷ where the court disallowed evidence of seatbelt non-use. In response, defendants argued that *Ingram* only addressed mitigation of damages, whereas this case involved fault for pre-tort conduct.²¹⁸ Defendant also noted that since the decision in *Ingram*, the Indiana Legislature has enacted statutes requiring the use of seatbelts.²¹⁹

With respect to the admissibility of the seatbelt defense under contributory negligence, defendants urged that they were not offering the seatbelt offense as evidence of the plaintiff's failure to mitigate his damages as were the defendants in *Ingram*; rather, they argued that the evidence should be admitted to demonstrate the negligence of the plaintiff.²²⁰ They further argued that the plaintiff had a common law duty to use reasonable care to avoid injury to himself. However, while the court of appeals agreed with this principle of tort law, it noted the difference between a plaintiff's duty to avoid injuring himself and a plaintiff's duty to anticipate the negligence of another.²²¹ "Under the common law, a plaintiff ordinarily does not have a duty to anticipate the negligence of another."²²² The court explained that the "policy rationale behind this principle is well-reasoned: if plaintiffs were required to anticipate the negligence of others, our jurisprudence would shift the duty of taking care from the careless to the careful."²²³ Applying common law principles to the present case, the court concluded that the plaintiff was not under a duty to anticipate the alleged negligence of the defendants, and believed this conclusion to be consistent with the supreme court's decision in *Ingram*.²²⁴ Although the court noted that *Ingram* dealt specifically with mitigation of damages, *Ingram* also

213. *See id.*

214. *Id.*

215. *See id.* at 569-70.

216. *See id.* at 570.

217. 427 N.E.2d 444 (Ind. 1981).

218. *See Hopper*, 716 N.E.2d at 572.

219. *See id.* at 573.

220. *See id.*

221. *See id.*

222. *Id.* (citing *Haugh v. Jones & Laughlin Steel Corp.*, 949 F.2d 914, 920-21 (7th Cir. 1991)).

223. *Id.*

224. *See id.*

noted that absent a clear legislative mandate creating a duty to wear a seatbelt, no such duty would be judicially created.²²⁵ The court of appeals found that the supreme court's decision in this vein clearly expanded the scope of the decision beyond just mitigation of damages to prohibit the creation of a duty of automobile occupants to wear a seatbelt.²²⁶ Thus, it held that allowing evidence of a plaintiff's failure to wear a seatbelt to establish contributory negligence would do just that.²²⁷

In response, the defendants argued that the statutory mandate mentioned in *Ingram* now exists. In 1985, the legislature enacted a mandatory passenger restraint law and created a statutory duty for occupants of certain vehicles to wear seatbelts.²²⁸ The court of appeals noted that it was presented with an interesting dilemma. The legislature has spoken on a passenger's duty to wear a seatbelt, however, that duty cannot be used to demonstrate fault and does not apply to plaintiffs.²²⁹ Specifically, the court found that, based on the language of *Ingram*, it must conclude that the Indiana Legislature has not altered the common law.²³⁰ The court reasoned that supreme court procedure mandated that there is no duty to wear a seatbelt absent a clear mandate from the legislature, and that the legislature enactments since *Ingram* are anything but clear.²³¹ Accordingly, the court of appeals found the state of the law with regard to the seatbelt defense today as the supreme court found it in *Ingram*: "there is no duty, common law or otherwise, for an occupant of a truck to wear his seatbelt."²³²

E. Tortious Conduct of Unincorporated Associations

In *Hanson v. Saint Lukes United Methodist Church*,²³³ the plaintiff, a church member, slipped and fell on an accumulation of snow and ice in the parking lot of a church following a social gathering she had attended at the church. Plaintiff subsequently filed suit against the church and its trustees for her personal injuries, alleging negligence for failure to maintain the parking lot, failure to inspect the parking lot for dangerous conditions, failure to remove the snow and ice from the parking lot, and failure to warn her of the dangerous conditions.²³⁴ The trial court granted summary judgment in favor of all defendants, applying the

225. *See id.*

226. *See id.* at 575.

227. *See id.*

228. *See* IND. CODE § 9-19-10-2 (1998) (requiring that each front seat occupant of a passenger motor vehicle that is equipped with a safety belt meeting the standards stated in the Federal Motor Vehicle Safety Standard Number 208 shall have a safety belt properly fastened about the occupant's body at all times when the vehicle is in forward motion).

229. *See id.*

230. *See Hopper*, 716 N.E.2d at 574.

231. *See id.* at 574-75 (citing *State v. Ingram*, 427 N.E.2d 444, 448 (Ind. 1981)).

232. *Id.*

233. 704 N.E.2d 1020 (Ind. 1998).

234. *See id.* at 1021.

common law rule that a member of an unincorporated association cannot sue the association for the negligence of another member. On appeal, the court of appeals reversed the summary judgment as to the church, and affirmed the summary judgment for the trustees.²³⁵ In ruling that the plaintiff could maintain a personal injury lawsuit against the church, the court applied an exception to the common law rule which the supreme court had never formally adopted.²³⁶ On transfer, the Indiana Supreme Court chose to accept the invitations of the court of appeals and revisit its previous ruling in *Calvary Baptist Church v. Joseph*.²³⁷

In *Calvary*, the Indiana Supreme Court held that, as a general rule, a member of an unincorporated association may not sue the association for injuries suffered as a result of the tortious acts of the association or its members.²³⁸ This rule rests upon the doctrine of imputed liability, which states that an association's membership is engaged in a joint enterprise, and the negligence of each member and the prosecution of that enterprise is imputable to each and every other member so that the member who has suffered damages through the tortuous conduct of another member of the association may not recover from the association for such damage.²³⁹ The supreme court noted that the requirement that the members of an unincorporated association be engaged in a joint enterprise does not mean, however, that at the time of the injuries, the members must be engaged in some specific "group activity."²⁴⁰ Rather, this requirement is generally satisfied in the church congregation setting because the congregation's members are thought to be engaged in the joint enterprise of worship and/or maintaining a premises for worshipping.²⁴¹ Applying the common law rule to the facts in *Calvary*, the Indiana Supreme Court held that a church member who had been injured when he fell off a ladder while repairing the church's roof could not sue the church.²⁴²

The *Hanson* court analyzed decisions of other jurisdictions that examined the erosion of the common law rule and noted that one vestige of the common law rule survives—our "obedience to an ancient precept automatically impeding the negligence of an unincorporated association to an injured member."²⁴³ However, it perceived no compelling reason for retaining this remnant of the original common law rules, and held that members should be allowed to bring tort actions against the unincorporated associations of which they are part, thus overruling

235. See *Hanson v. St. Lukes United Methodist Church*, 682 N.E.2d 1314 (Ind. Ct. App. 1997), *aff'd*, 704 N.E.2d 1020 (Ind. 1998).

236. See *Hanson*, 704 N.E.2d at 1021.

237. 522 N.E.2d 371 (Ind. 1988).

238. See *id.* at 374.

239. See *id.* at 374-75; see also 65A C.J.S. *Negligence* § 158 (1966).

240. *Hanson*, 704 N.E.2d at 1022 (citing *Biereichel v. Smith*, 693 N.E.2d 634, 637 (Ind. Ct. App.), *vacated*, 704 N.E.2d 456 (Ind. 1998)).

241. See *id.* at 1020.

242. See *Calvary*, 522 N.E.2d at 372.

243. *Hanson*, 704 N.E.2d at 1025.

Calvary.²⁴⁴ In addition, the court noted that it believed this change in the common law may also be justified by Indiana's shift from a system of contributory negligence to one of comparative fault.²⁴⁵ It reasoned that under a system of contributory negligence, the common law doctrine of imputed negligence necessarily barred these types of suits, assuming no exceptions apply.²⁴⁶ However, under a comparative fault system, the relevant issue is not whether the injured party is a member of the association, but rather whether his or her own degree of actual causative negligence, if any, is greater or lesser than that of which he or she complains.²⁴⁷

In conclusion, *Hanson* abolished the ancient precept which precluded members of unincorporated associations from suing their associations for tortious conduct, holding that such suits shall now be allowed, subject to the applicable principles of comparative fault and the limitations imposed by the Indiana Rules of Trial Procedure.²⁴⁸

II. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

For nearly one hundred years, Indiana adhered to the "impact rule" with regard to the recovery of damages for negligent infliction of emotional distress. This rule required that the mental distress be accompanied by, and result from, a physical injury caused by an impact to the person seeking recovery. Just nine years ago, the Indiana Supreme Court specifically declined to abolish the impact rule in a case involving emotional trauma suffered by a mother who witnessed her son die as a result of an automobile accident in which she was involved.²⁴⁹ Instead of abolishing the impact rule, the court modified the rule as follows:

When . . . a plaintiff sustains a direct impact by the negligence of another and, by virtue of that direct involvement sustains an emotional trauma which is serious in nature and of a kind and extent normally expected to occur in a reasonable person, we hold that such a plaintiff is entitled to maintain an action to recover for that emotional trauma without regard to whether the emotional trauma arises out of or accompanies any physical injury to the plaintiff.²⁵⁰

Thus, while physical injury is no longer required, the plaintiffs seeking recovery for negligently caused emotional distress must still sustain a *direct physical impact* by the negligence of the defendant.²⁵¹

244. *See id.*

245. *See id.*

246. *See id.* at 1026.

247. *See id.*

248. *See id.*

249. *See Shuamber v. Henderson*, 579 N.E.2d 452, 456 (Ind. 1991)

250. *Id.*

251. *See id.*; *see also Miller v. May*, 656 N.E.2d 1198, 1200 (Ind. Ct. App. 1995) ("[T]he modified impact rule maintains the requirement that the plaintiff demonstrate that he suffered a

Post-*Shuamber* decisions have clearly and consistently applied this rule of law to restrict emotional distress claims where there is an insufficient nexus between the defendant's conduct and the plaintiff's alleged injury.²⁵²

The Indiana Court of Appeals handed down another opinion this year following the line of cases restricting recovery on a claim for emotional distress. In *Groves v. Taylor*,²⁵³ the court held that an eight year old child who witnessed an accident involving her younger brother's death suffered no direct physical impact and could not recover for emotional distress under Indiana law. In *Groves*, eight year old Mary Beth walked her six year old brother down the driveway to check the mailbox across the road. As Mary Beth turned to walk back toward the house, her brother proceeded to cross the road and was hit by a car. Mary Beth heard, but did not see, the impact. The car was driven by a State Trooper. Mary Beth brought a claim against the State for emotional distress. The State was granted summary judgment. Mary Beth appealed, arguing that her proximity and relationship to her brother caused her to be directly involved in the accident.²⁵⁴ Mary Beth urged the court of appeals to modify Indiana law to permit her recovery. The court held that it was not the province of the court of appeals to render that decision and invited the supreme court to do so.²⁵⁵

direct physical impact.").

252. *Compare* *Dollar Inn, Inc. v. Slone*, 695 N.E.2d 185 (Ind. Ct. App. 1998) (finding a direct impact where the plaintiff was stabbed by a needle and brought a claim for the fear of AIDS and mental distress suffered as a result of the needle stab); *J.L. v. Mortell*, 633 N.E.2d 300 (Ind. Ct. App. 1994) (holding that a physical therapy patient could maintain an action for the negligent infliction of emotional distress where her therapist performed inappropriate and unfounded vaginal massages on her because the massages constituted a direct impact); *and* *Bader v. Johnson*, 675 N.E.2d 1119 (Ind. Ct. App. 1997) (finding a direct physical impact where the plaintiff experienced a continued pregnancy and delivered a child with severe congenital defects after the defendant-physician negligently failed to disclose the results of pre-natal testing), *with* *Gorman v. I&M Electric Co., Inc.*, 641 N.E.2d 1288 (Ind. Ct. App. 1994) (holding that the plaintiff failed to show a direct physical impact where she mistakenly concluded that her five-year-old son remained in her burning home and watched as her husband re-entered the home in search of the child); *Comfax v. North American Van Lines*, 587 N.E.2d 118, 127 (Ind. Ct. App. 1992) (holding that the plaintiff failed to show a direct impact where he merely "saw" his business decline as a result of the defendant's negligence); *and* *Etienne v. Caputi*, 679 N.E.2d 922 (Ind. Ct. App. 1997) (finding no direct physical impact where defendant-physician misdiagnosed the plaintiff's breast cancer by incorrectly reading a mammogram because the plaintiff was not physically touched by the physician and did not witness a loved one's death).

253. 711 N.E.2d 861 (Ind. Ct. App. 1999).

254. *See id.* at 864.

255. *See id.* Judge Kirsch dissented, noting that severe, debilitating and foreseeable emotional effects can result from traumatic events without physical impact and that this case presented an opportunity to take another step towards expanding the impact rule. *See id.* at 864 (Kirsch, J., dissenting), *rev'd*, 729 N.E.2d 569 (Ind. 2000). The court's reasoning will be discussed in next year's Survey Issue.

In *Ross v. Cheema*,²⁵⁶ and *Conder v. Wood*,²⁵⁷ the supreme court decided to accept such an invitation. In *Ross*, the defendant, deliveryman Cheema, was attempting to deliver a certified termination letter to the plaintiff, Ross, at her home. Ross was inside her home, sitting in a recliner recovering from surgery. Cheema (1) pounded on Ross' door; (2) opened Ross' screen door; and, (3) twisted and shook the door knob on Ross' inner door.²⁵⁸ Ross testified that she was frightened that an intruder was trying to gain entry into her home. She placed a steak knife in her pants and went to the door. She was presented with a clipboard and asked to "sign here." Cheema never touched Ross, no instrumentality of his ever came into physical contact with Ross, and he never entered Ross' house.²⁵⁹ Based upon Cheema's argument that Ross sustained no direct physical impact as required under Indiana law to recover for the negligent infliction of emotional distress, the trial court entered summary judgment in favor of Cheema.²⁶⁰

The Indiana Court of Appeals held that Ross satisfied Indiana's modified impact rule announced in *Shuamber* requiring that a party claiming negligent infliction of emotional distress sustain a direct physical impact in relation to the defendant's negligence before being entitled to recover for her alleged emotional damages.²⁶¹ The court reasoned that being inside one's home that sustains a physical impact (i.e., pounding on the door) is similar to being inside a car which sustains a physical impact (i.e., the facts of *Shuamber*).²⁶²

Apparently finding that the Indiana Court of Appeals opinion in *Ross* represented an unwarranted departure from the modified impact rule, the Indiana Supreme Court granted transfer, vacated the court of appeals' opinion, and affirmed the judgment of the trial court.²⁶³ The court found that the touching of a building in which a plaintiff is situated does not constitute a direct physical impact.²⁶⁴ While the defendant deliveryman pounded on Ross' door, opened the screen door, and shook the door knob on Ross' inner door, the deliveryman never touched Ross, no instrumentality of his ever came into physical contact with Ross, and he never entered Ross' house. Moreover, the deliveryman said nothing to Ross other than to request that she sign for a letter.²⁶⁵ He did not step into Ross' house, he did not threaten Ross, he did not have a weapon, and he did not touch Ross. Put simply, Ross was neither directly nor physically impacted in any

256. 716 N.E.2d 435 (Ind. 1999).

257. 716 N.E.2d 432 (Ind. 1999).

258. See *Ross*, 716 N.E.2d at 436.

259. See *id.*

260. See *id.*

261. See *Ross v. Cheema*, 696 N.E.2d 437, 439 (Ind. Ct. App. 1998), *rev'd*, 716 N.E.2d 435 (Ind. 1999).

262. See *id.*

263. See *Ross*, 716 N.E.2d at 435.

264. See *id.* at 436.

265. See *id.*

way by the defendant's conduct.²⁶⁶

In *Conder v. Wood*,²⁶⁷ the Indiana Supreme Court reached a contrary result on the same day. In *Conder*, a pedestrian was attempting to cross a street with a companion when the companion was struck and fatally injured by a truck which was negotiating a turn. The plaintiff had seen that the truck was not going to stop and jumped out of its path.²⁶⁸ She attempted to pull her companion back; however, before she had time to react, the front wheel of the truck struck her companion and knocked her violently to the ground. The truck continued to roll directly next to where the plaintiff was standing and in the direct path of her fallen companion.²⁶⁹ Afraid that the truck would run her companion over, the plaintiff began pounding on the panels of the truck trailer to get the driver's attention. The truck came to a stop just before the rear tire ran over her companion's head; nevertheless, the companion died at the scene.²⁷⁰

As a result of the incident, the plaintiff sustained bruises on her arm, emotional and psychological trauma, stress-related headaches, insomnia and personality changes. The plaintiff subsequently filed suit against the truck driver and the trucking company, seeking recovery for her emotional injuries under a theory of negligent infliction of emotional distress.²⁷¹ The defendants filed a motion for summary judgment, arguing that any recovery sought by the plaintiff for emotional distress or psychological damage was precluded under Indiana law. The trial court issued an order denying summary judgment.²⁷²

On appeal, the defendants argued that the modified impact rule announced in *Shuamber* precluded the plaintiff from recovering damages.²⁷³ Relying on this Indiana Supreme Court decision, the Indiana court of appeals remarked that it must determine whether the plaintiff suffered a direct physical impact by the negligence of the defendant truck driver.²⁷⁴ The court of appeals found that the only physical impact between the plaintiff and the truck driven by the defendant was initiated through the plaintiff's own actions, and not directly through the truck driver's negligence.²⁷⁵ Thus, the court held that while it was clear that the plaintiff was involved in the incident which resulted in her companion's death, she did not suffer a "direct physical impact by the negligence of another" necessary for the application of the modified impact rule.²⁷⁶

The Indiana Supreme Court found that as long as an impact occurred from

266. *See id.*

267. 716 N.E.2d 432 (Ind. 1999).

268. *See id.* at 433.

269. *See id.*

270. *See id.*

271. *See id.* at 434.

272. *See id.*

273. *See id.*

274. *Conder v. Wood*, 691 N.E.2d 490, 493 (Ind. Ct. App. 1998), *rev'd*, 716 N.E.2d 432 (Ind. 1999).

275. *See id.*

276. *Id.* (quoting *Shuamber v. Henderson*, 579 N.E.2d 452, 456 (Ind. 1991)).

the plaintiff's direct involvement in the tortfeasor's conduct, it mattered little *how* the physical impact occurred.²⁷⁷

While it appears that the Indiana Supreme Court will continue to follow the modified impact rule and require some impact, the standard is relaxed somewhat so that the source of the impact may be irrelevant.

III. INDIANA'S SHOPLIFTING DETENTION STATUTE

In *Wal-Mart Stores, Inc. v. Bathe*,²⁷⁸ the Indiana Court of Appeals once again addressed the scope of Indiana's Shoplifting Detention Act. The opinion basically stands for the proposition that the reasonableness of a suspected shoplifter's detention may be determined as a matter of law and that if the detention is reasonable a merchant is immune from claims for negligence, defamation, and fraud.

In *Bathe*, an alarm was triggered when Wal-Mart customers attempted to leave the store. Wal-Mart employees escorted the customers back to the checkout and ascertained in a short amount of time that nothing in the shopping bags was triggering the alarm. The customer's purse was then passed through the alarm, at which time the alarm sounded.²⁷⁹ The purse was emptied, and an empty Dristan box was located. Because the item had been purchased elsewhere, the Wal-Mart employees deactivated the plastic tag and allowed the customer to leave.²⁸⁰

The entire event lasted no longer than fifteen minutes, and the Indiana Court of Appeals concluded, as a matter of law, that the length of the detention was not unreasonable.²⁸¹ The court noted that, while the customer may have been embarrassed by the manner of the store's search, the Shoplifting Detention Act "authorizes a merchant to take steps that might inevitably result in some embarrassment to innocent customers."²⁸² On the other hand, the Act "does not immunize a merchant from liability for negligence based upon allegations that it conducted an unreasonable search."²⁸³

Of equal importance, the court extended the scope of the Act to claims of defamation and fraud. Therefore, if a merchant's actions are determined to be reasonable, the merchant is immune from claims of defamation and fraud as well as negligence.

IV. WRONGFUL DEATH AND SURVIVAL STATUTE

During the course of this survey period, both the Indiana Supreme Court and

277. See *Conder*, 716 N.E.2d at 435.

278. 715 N.E.2d 954 (Ind. Ct. App. 1999), *trans. denied*, No. 49A02-9812-CV-1001, 2000 Ind. LEXIS 126 (Ind. Feb. 17, 2000).

279. See *id.* at 956.

280. See *id.*

281. See *id.* at 961.

282. *Id.*

283. *Id.* at 962.

court of appeals rendered significant and controversial decisions interpreting the scope and breadth of Indiana's wrongful death and survival statutes.

A. Child Wrongful Death Statute

1. *Measuring Period for Calculating Loss of Child's Love and Companionship.*—In *Robinson v. Wroblewski*,²⁸⁴ plaintiffs brought a wrongful death action against defendant seeking recovery for the death of their son, who was killed in an automobile accident with the defendant driver. Specifically, plaintiffs sought damages for the loss of their son's love and companionship measured using the time period from his death until the death of his last surviving parent.²⁸⁵ Defendants moved to strike from the complaint the plaintiffs' request for damages measured using this time, arguing that plaintiffs should only be entitled to recover damages measured using the time from the date of decedent's death until the date decedent would have reached the age of 23. This latter measuring period is the same as that assigned by Indiana's Wrongful Death Statute for damages for the loss of a child's services.²⁸⁶

The trial court concluded that the legislature intended specific and independent limitations on damages and found that the recovery for the loss of a child's love and companionship began upon the death of the child and extended until the death of the last surviving parent. The Indiana Court of Appeals affirmed the trial court's decision, holding that "Indiana's Child Wrongful Death Act permits the recovery of damages for the loss of a child's love and companionship until the death of the last surviving parent."²⁸⁷

On transfer, the Indiana Supreme Court engaged in a lengthy analysis of the history of the Child Wrongful Death Act. It then focused its inquiry on whether, as the bill proceeded through the legislative process, evidence existed that the Indiana General Assembly meant to change the measuring period provisions of the bill as introduced; i.e., providing a different measuring period for calculating damages for loss of a child's services than that for loss of a child's love and companionship.²⁸⁸ Although the court acknowledged that Indiana's Child Wrongful Death Act had undergone substantial revisions, it determined from a detailed examination of the bill's legislative history and rules of statutory construction that the legislature did not intend to change this aspect of the bill as introduced.²⁸⁹ Therefore, the court concluded that the Indiana Child Wrongful Death Act, specifically Indiana Code sections 34-23-2-1(f) and (g), permits the recovery of damages for the loss of a child's love and companionship from the

284. 704 N.E.2d 467 (Ind. 1998).

285. See *id.* at 468.

286. See *id.* at 467-68 (citing IND. CODE §34-23-2-1(a) (1998)).

287. *Robinson v. Wroblewski*, 679 N.E.2d 1348, 1349 (Ind. Ct. App. 1997), *aff'd*, 704 N.E.2d at 467.

288. *Robinson*, 704 N.E.2d at 471-72.

289. See *id.* at 476.

death of a child until the death of a child's last surviving parent.²⁹⁰

In a dissenting opinion, Justice Boehm noted that the majority's careful analysis of the statute and its legislative history leads inescapably to the conclusion that the statute is internally inconsistent and that someone failed at the drafting stage to consider all of the implications in subsection (f) for other provisions of the statute.²⁹¹ Justice Boehm could not find anything in the statute that resolves this inconsistency or that points in the direction of resolving disputes in favor of either party. However, he stated that the internal logic of the statute seems more offended by the majority's result than by a literal reading of subsection (f) to limit all damages under "this section" to age twenty-three for students and age twenty for others.²⁹²

In Justice Boehm's opinion,

the result of the majority's view is that the legislature intended the following results: (1) economic loss and the loss of a child's services and out-of-pocket expenses for the survivor's psychiatric care are not recoverable after age twenty-three, but loss of love and affection is recoverable beyond that time; and (2) a child who is killed at age twenty-three and one day is wholly not compensable, but loss of love and affection from the death of that child's twin that occurs two days earlier is compensable for the life of the parents.²⁹³

Justice Boehm found these results sufficiently bizarre that it is unlikely that the legislature would have approved them.²⁹⁴ He concluded by stating that the issue is purely a matter of legislative policy, and that the majority may well be correct in divining the legislature's intentions.²⁹⁵ If so, he noted this decision will stand. If not, he noted the General Assembly can fix it.²⁹⁶

2. *Common Law Claims for Loss of Services and Punitive Damages.*—In *Forte v. Connerwood Healthcare, Inc.*,²⁹⁷ a mother whose son had died while in a nursing home brought suit individually and on behalf of her son's estate alleging that the nursing home's negligence had caused her son's death. Plaintiff subsequently amended her complaint to include a claim for punitive damages, alleging that the nursing home's negligence was willful and wanton.²⁹⁸ The defendant nursing home moved for partial judgment on the pleadings with respect to the issue of punitive damages. The trial court granted the motion, finding that punitive damages are not allowed under the Child Wrongful Death

290. *See id.*

291. *See id.* (Boehm, J., dissenting).

292. *Id.*

293. *Id.*

294. *See id.*

295. *See id.*

296. *See id.*

297. 702 N.E.2d 1108 (Ind. Ct. App. 1998), *trans. granted*, 702 N.E.2d 1168 (Ind. 1999) (mem.).

298. *See id.* at 1110.

Statute.²⁹⁹

On appeal, the court began its analysis by noting that, at common law, there was no liability in tort for killing another person because actions for personal injury did not survive the death of an injured party.³⁰⁰ Thus, wrongful death actions have been held to be purely creatures of statute and only those damages prescribed by the statute may be recovered.³⁰¹ The court of appeals therefore agreed that Indiana courts have consistently held that punitive damages are not recoverable under the statutes governing wrongful death actions.³⁰²

However, the court of appeals stated that a wrongful act resulting in an injury to a minor child gives rise to a common law cause of action in favor of the parent for the loss of the child's services.³⁰³ Thus, the court found that a common law cause of action survives and continues to provide a remedy for parents for the loss of their child's services from the time of injury up until the child's death. "[A]s the common law right of recovery ends at the child's death, the child wrongful death statute provides a parent with an additional remedy to recover damages, including the damages related to the loss of a child's services, which pertain to a period of time after a child's death."³⁰⁴

The court noted that the plaintiff brought her lawsuit in her individual capacity as well as on behalf of her son's estate, and therefore stated a redressable common law claim for the loss of her son's services from the date of defendant's first negligent act or omission until the time of the child's death.³⁰⁵ It found that the common law remedy therefore preceded and survived the additional remedy provided by the Wrongful Death Statute.³⁰⁶ Accordingly, the court held that the plaintiff had appropriately stated a redressable claim for punitive damages in her individual capacity, and that the trial court erred to the extent it granted judgment on the pleadings with respect to the plaintiff's individual claim for punitive damages associated with her common law claim for the loss of her child's services.³⁰⁷

299. *See id.*

300. *See id.* at 1111 (citing *Ed Wiersma Trucking Co. v. Pfaff*, 643 N.E.2d 909, 911 (Ind. Ct. App. 1994)).

301. *See id.*; *see also* *Wolf v. Boren*, 685 N.E.2d 86, 88 (Ind. Ct. App. 1997); *Andis v. Hawkins*, 489 N.E.2d 78, 81 (Ind. Ct. App. 1986).

302. *Forte*, 702 N.E.2d at 1111 (citing *Rogers v. R.J. Reynolds Tobacco Co.*, 557 N.E.2d 1045, 1056 (Ind. Ct. App. 1990) (Adult Wrongful Death Statute); *Andis*, 489 N.E.2d at 83 (Child Wrongful Death Statute)). Based on these observations, Indiana courts have consistently held that punitive damages are not recoverable under the statutes governing wrongful death actions. *See id.*

303. *See Forte*, 702 N.E.2d at 1112 (citing *Boyd v. Blaisdell*, 15 Ind. 73, 75-76 (1860); *Buffalo v. Buffalo*, 441 N.E.2d 711, 714 (Ind. Ct. App. 1992)).

304. *Id.* at 1112-13 (citing IND. CODE § 34-23-2-1(f) (1998) (the child wrongful death statute provides that: "Damages may be awarded . . . only with respect to the period of time from the death of the child until [one of the three later dates.]").

305. *See id.* at 1113.

306. *See id.*

307. *See id.* at 1114-15 (citing *Rogers*, 557 N.E.2d at 1057).

In a dissenting opinion, Judge Baker stated that actions for the death of a child continued to be limited to pecuniary loss and cannot be extended to punitive damages.³⁰⁸ Judge Baker noted that the item of punitive damages remains conspicuously absent from Indiana's Wrongful Death Act, and that neither the court of appeals nor the supreme court should simply "cast away" longstanding precedent.³⁰⁹ Judge Baker indicated that because the legislature has not permitted the recovery of punitive damages with respect to actions involving the death of a child, he would affirm the trial court's order granting the defendant's motion for partial judgment on the pleadings.³¹⁰

B. Adult Wrongful Death Statute

1. *Determination of Beneficiary Status.*—In *Johnson Controls, Inc. v. Forrester*,³¹¹ a decedent's wife, as administrator of his estate, brought a wrongful death action against defendants, seeking, among other things, monetary damages on behalf of their minor child for loss of love and affection. Defendants moved to compel discovery and for a physical examination seeking to prove that the child born during decedent's marriage to the wife was not the decedent's biological child. Defendants argued that the plaintiff was not entitled to recover emotional damages on behalf of the child under Indiana's Wrongful Death Statute.³¹² On appeal, the court restated the issue in this case as follows: "whether a third-party in a wrongful death action may seek to disestablish paternity, and thus, the statutory beneficiary status of a dependent child born into an intact marriage when the decedent, during his lifetime, did not challenge such paternity."³¹³ Specifically, the court was faced with the issue of whether, through discovery, defendant could challenge the plaintiff's son's status as a statutory beneficiary in a wrongful death case by attempting to disestablish paternity even though the child was born into an intact marriage and the decedent, during his lifetime did not challenge the paternity of the child.³¹⁴

The court began its discussion by noting that the issue raised necessarily involves elements of paternity and inheritance.³¹⁵ It further noted that the Wrongful Death Statute "specifically links a beneficiary's [r]ight to recovery under the [statute] with his or her [r]ight to receive a distribution of the decedent's personal property."³¹⁶ It then looked to Indiana's probate laws, and determined that the Indiana legislature intended for all heirship relationships to become absolute at a decedent's death, except as provided for by statute relating

308. See *id.* at 1115-16 (Baker, J., dissenting).

309. See *id.*

310. See *id.* at 116-17.

311. 704 N.E.2d 1082 (Ind. Ct. App.), *trans. denied*, 726 N.E.2d 300 (Ind. 1999).

312. See *id.* at 1083.

313. *Id.*

314. See *id.* at 1084.

315. See *id.* at 1083.

316. *Id.* at 1084 (citing *Melvin v. Patterson*, 965 F. Supp. 1212, 1217 (S.D. Ind. 1997)).

to a child born out of wedlock.³¹⁷ It next looked to the reasoning in *Estate of Lamey*, where the court of appeals reasoned that the heirship relationship between a child and a decedent is "frozen" at a decedent's death.³¹⁸

Due to the interrelationship between wrongful death and heirship, the Indiana Court of Appeals found that the reasoning in *Lamey* is applicable to wrongful death actions, and the court held that the relationship between the plaintiff's child and the decedent was fixed upon decedent's death for purposes of the child's status as a beneficiary under the Wrongful Death Statute.³¹⁹ The court reasoned that the presumption that the child is a statutory beneficiary under the Wrongful Death Statute became irrefutable upon decedent's death and could not now be challenged by defendants.³²⁰ It further reasoned that to allow defendant to make such challenge to a child born into an intact marriage where the decedent did not challenge paternity during his lifetime would open the door for a paternity challenge in every wrongful death case where the decedent is survived by a dependent child and that public policy did not support such attacks.³²¹

2. *Intervening Cause of Death*.—In *Best Homes, Inc. v. Rainwater*,³²² the decedent was seriously injured in a construction site accident as a result of defendant's alleged negligence. The decedent's injuries caused him considerable pain, prevented him from working, created financial hardship, and caused stress in his marriage. Decedent became addicted to pain killers and his inability to work took a toll on his mental state.³²³ Ultimately, decedent became unbearable to live with and he and his wife divorced. Decedent's emotional state continued to decline and, after battering his estranged wife, he was arrested. While in jail decedent hung himself.³²⁴

Decedent's complaint for damages was subsequently amended, substituting his estate as the plaintiff and requesting damages under the alternate theories of Indiana's Wrongful Death Statute and Indiana's Survivorship Statute. Defendant moved for partial summary judgment on the wrongful death claim, asserting that decedent's suicide was an independent intervening and superseding cause which served to cut off its liability for decedent's death.³²⁵ On appeal following the trial court's denial of the motion, the Indiana Court of Appeals noted that the Wrongful Death Statute provides a cause of action when "the death is caused by the wrongful act or omission of another."³²⁶ In contrast, the Survivorship Statute applies when a person: (1) receives personal injuries caused by the wrongful act or omission of another; and (2) subsequently dies from causes other than those

317. See *id.* (citing *Estate of Lamey v. Lamey*, 689 N.E.2d 1265 (Ind. Ct. App. 1997)).

318. See *id.* at 1085 (citing *Lamey*, 689 N.E.2d at 1268).

319. See *id.*

320. See *id.*

321. See *id.*

322. 714 N.E.2d 702 (Ind. Ct. App. 1999).

323. See *id.* at 704.

324. See *id.*

325. See *id.*

326. *Id.* at 705 (citing IND. CODE § 34-23-1-1 (1998)).

personal injuries.³²⁷ The court noted that a comparison of the language of the two statutes reveals that a tortfeasor may be held liable under *either* the Wrongful Death Statute or the Survivorship Statute, *but not both*.³²⁸ If the victim dies from injuries sustained in the accident, the case falls under the Wrongful Death Statute. However, if the victim dies from unrelated causes, the case falls under the Survivorship Statute. In an action brought under the Wrongful Death Statute, a personal representative may recover damages “including, but not limited to, reasonable medical, hospital, funeral and burial expenses, and lost earnings of such deceased person.”³²⁹ In an action brought under the Survivorship Statute, “the personal representative of the decedent may recover all damages resulting before the date of death from those injuries that the decedent would have been entitled to recover had the decedent lived.”³³⁰

With respect to defendant’s argument concerning intervening and superseding cause, the court of appeals noted that where harmful consequences are brought about by intervening and independent forces that were not reasonably foreseeable at the time of the defendant’s conduct, the chain of causation is broken and the intervening cause may serve to cut off the defendant’s liability.³³¹ It further noted that although the issue of proximate cause is not properly resolved by summary judgment, where the injuries could not, as a matter of law, have been reasonably foreseen due to the unforeseeability of an intervening, superseding cause, summary judgment may appropriately be entered in favor of the defendant.³³²

The court of appeals looked to supreme court precedent finding that suicide constitutes an intervening cause only if it is the “voluntary” and “willful” act of the victim.³³³ The court found that a jury could reasonably conclude that decedent’s suicide was neither voluntary nor willful, but accomplished in delirium or frenzy.³³⁴ It reasoned that the decedent’s severe pain prevented him from working and caused severe depression and an addiction to pain medication.³³⁵ Because the decedent’s state of mind at the time of his suicide was an issue, the court determined that the question as to whether the suicide was voluntary or willful was properly left to a jury.³³⁶

3. *Waiver of Rights to Recovery*.—In *Flock v. Snider*,³³⁷ the Indiana Court

327. See *id.* (citing IND. CODE § 34-9-3-4).

328. See *id.* (citing *American Int’l Adjustment Co. v. Galvin*, 86 F.3d 1455, 1457 (7th Cir. 1996)).

329. *Id.* (citing IND. CODE § 34-23-1-1; *Ed Wiersma Trucking Co. v. Pfaff*, 643 N.E.2d 909, 911 (Ind. Ct. App. 1994)).

330. *Id.* (citing IND. CODE § 34-9-3-4).

331. See *id.* at 706 (citing *Havert v. Caldwell*, 452 N.E.2d 154, 158-59 (Ind. 1993)).

332. See *id.* (citing *Havert*, 452 N.E.2d at 159).

333. See *id.* (citing *Hooks SuperX, Inc. v. McLaughlin*, 642 N.E.2d 514, 521 (Ind. 1994)).

334. See *id.* at 707.

335. See *id.*

336. See *id.*

337. 700 N.E.2d 466 (Ind. Ct. App. 1998).

of Appeals was faced with the issue of whether a statutory beneficiary has the authority to waive a claim for damages recoverable under the Indiana Wrongful Death Statute.³³⁸ Decedent was killed in an automobile accident in which he was a passenger in a car driven by his step-daughter. The executrix of the decedent's estate subsequently filed a wrongful death action against decedent's step-daughter.³³⁹ The defendant's mother, decedent's widow, then signed an affidavit that stated her desire to waive her right to any benefits available to her under the Wrongful Death Statute. This affidavit was presented in support of a motion for partial summary judgment filed by defendant. The trial court granted defendant's motion, thereby precluding the executrix from recovering damages otherwise available under the statute.³⁴⁰

On appeal, the plaintiff maintained that the trial court's decision was erroneous because the widow's affidavit relinquishing her rights under section 34-1-1-2 of the Indiana Code was not a valid waiver.³⁴¹ Specifically, the plaintiff claimed that the waiver was premature and therefore ineffective in precluding the executrix of the estate from recovering all damages provided by the Wrongful Death Statute.³⁴² On this issue, the Indiana Court of Appeals concluded that decedent's widow, the sole beneficiary under the statute, had the authority to waive her claim to any damages recoverable under the statute.³⁴³ It noted that although the statute authorizes only the personal representative of the decedent to commence a wrongful death action, the personal representative does so only as a trustee for the statutory beneficiaries.³⁴⁴ The court concluded that although the executrix had standing on behalf of the estate to seek such damages, she lacked the factual basis to prosecute such a claim because decedent's widow relinquished her claim under the Wrongful Death Statute, thus terminating the executrix's basis upon which to bring an action to recover damages on the beneficiary's behalf.³⁴⁵

4. *Evidence of Personal Maintenance Expenses.*—During the course of this survey period, the Indiana Court of Appeals rendered a controversial decision interpreting damages recoverable under the Indiana Wrongful Death Statute. In *Elmer Buchta Trucking, Inc. v. Stanley*,³⁴⁶ the court of appeals held that the Wrongful Death Act mandates, by its plain language, that a wrongful death plaintiff recover the entire amount of the decedent's lost earnings, without an

338. See *id.* at 468.

339. See *id.* at 467.

340. See *id.*

341. See *id.* at 468.

342. See *id.*

343. See *id.*

344. See *id.* (citing *Rogers v. Grunden*, 589 N.E.2d 248, 258 (Ind. Ct. App. 1992); *Thomas v. Eads*, 400 N.E.2d 778, 782 (Ind. Ct. App. 1980)).

345. See *id.*

346. 713 N.E.2d 925 (Ind. Ct. App. 1999), *trans. denied*, No. 14A01-9805-CV-1649, 2000 Ind. LEXIS 172 (Ind. Feb. 17, 2000).

offset for the decedent's personal maintenance expenses.³⁴⁷

In *Buchta*, the decedent died as a result of injuries he sustained during a collision between his vehicle and a truck driven by an agent of the defendant. The co-representatives of decedent's estate brought a wrongful death action and the case proceeded to trial by jury.³⁴⁸ During the trial, defendant sought to introduce evidence of the decedent's "personal maintenance" to reduce the damage award by proving that a portion of decedent's lost earnings would have been unavailable to his family even if he had lived to his expected age. The trial court granted the plaintiff's motion in limine to exclude such evidence, and defendant preserved the issue for appeal by making an offer to prove at trial in which an expert testified that decedent would have consumed approximately twenty-four percent of his lifetime earnings for his personal maintenance.³⁴⁹

On appeal, defendant contended that the trial court abused its discretion by misinterpreting Indiana's Wrongful Death Act. Specifically, defendant argued that the Act requires that damages based upon a decedent's lost earnings be reduced by personal maintenance expenses and the trial court's failure to admit personal maintenance evidence constituted an abuse of discretion.³⁵⁰ Plaintiff responded that the Act requires the full amount of damages of a decedent's lost earnings be included in a damage award. Thus, the plaintiff argued that personal maintenance evidence is never admissible in a wrongful death action.³⁵¹

The court of appeals found that the Indiana Supreme Court had long interpreted the damage provision of the Wrongful Death Act to permit recovery for a decedent's lost earnings, but that such precedent also required that those damages be reduced by the decedent's personal maintenance expenses.³⁵² The court noted, however, that the 1965 amendments to the Wrongful Death Statute had previously unmentioned language with respect to a decedent's lost earnings and found that since that time Indiana appellate courts have not addressed whether trial courts are required to admit or exclude evidence of personal maintenance expenses pursuant to this provision.³⁵³

In response, defendants argued that statements of the Indiana Supreme Court in *Burnett v. State*,³⁵⁴ suggested that the supreme court believed personal maintenance evidence relevant in determining wrongful death damages.³⁵⁵ However, the court of appeals stated that, although these statements by the supreme court do suggest that the court believes personal maintenance evidence relevant in determining wrongful death damages, it did not believe the supreme

347. See *id.* at 930.

348. See *id.* at 927.

349. See *id.*

350. See *id.* at 928.

351. See *id.*

352. See *id.* (citing *Pittsburgh, C.C. & St. L. Ry. Co. v. Burton*, 37 N.E. 150, 156 (Ind. 1894)).

353. See *id.*

354. 467 N.E.2d 664 (Ind. 1984).

355. See *Buchta*, 713 N.E.2d at 931 n.5 (citing *Burnett*, 467 N.E.2d at 666).

court directly confronted the issue presented by this case; i.e., the precise meaning of the Wrongful Death Statute as it pertains to damages based upon lost earnings.³⁵⁶ Therefore, the court did not consider *Burnett* binding precedent on this point of law.³⁵⁷

The court next looked to the plain language of the Wrongful Death Act for guidance. Defendant contended that the damage provision of the Act as it relates to lost earnings is ambiguous, while the plaintiffs contended that the damage provision is unambiguous and the plain language of the Act mandates that a wrongful death plaintiff recover the entire amount of a decedent's lost earnings without the offset for personal maintenance.³⁵⁸ The court of appeals agreed with the plaintiffs.³⁵⁹

Indiana's Wrongful Death Act provides, in relevant part: "[D]amages shall be in such an amount as may be determined by the court or jury, including, but not limited to . . . lost earnings of such deceased person"³⁶⁰ The court agreed with defendant that the statute vests the fact-finder with the discretion to determine the amount of the wrongful death damages, but noted that the statute also specifies, in part, the manner by which these damages are to be determined.³⁶¹ Specifically, it found that the statute specifies that wrongful death damages include the decedent's lost earnings and that there is nothing ambiguous about this requirement.³⁶² It therefore determined that personal expenses are not pertinent to the calculation of the decedent's lost earnings.³⁶³

Recognizing the significance of the court of appeals' decision with respect to the issue of personal maintenance expenses under Indiana's Wrongful Death Act, the Indiana Supreme Court has accepted transfer of this case. Therefore, the court of appeals' decision has been vacated.³⁶⁴ A decision has not yet been rendered by the Indiana Supreme Court.

C. Survival Statute and Punitive Damages

In *Foster v. Evergreen Healthcare, Inc.*,³⁶⁵ the personal representative of the estate of a nursing home resident who had suffered burns over fifty percent of his

356. See *id.*

357. See *id.*

358. See *id.* at 929.

359. See *id.*

360. IND. CODE § 34-1-1-2 (1998).

361. *Buchta*, 713 N.E.2d at 929.

362. See *id.*

363. See *id.*

364. See *Southern Ry. Co. v. Ingle*, 69 N.E.2d 746 (Ind. Ct. App. 1946) (holding that when the supreme court transfers a case decided by the court of appeals, the appellate court's decision is set aside, vacated and expunged from the record, and the case stands as though it had been appealed directly to the supreme court).

365. 716 N.E.2d 19 (Ind. Ct. App. 1999), *trans. denied*, No. 49A04-9808-CV-422, 2000 Ind. LEXIS 144 (Ind. Feb. 17, 2000).

body while being lowered into a tub for a whirlpool bath, and who subsequently died of unrelated causes, brought a survival action against the operator of the nursing home.³⁶⁶ Defendant filed a motion for partial summary judgment on the plaintiff's punitive damage claim. The trial court issued an order granting defendant's motion, finding that punitive damages cannot be recovered under the Indiana Survival Statute.³⁶⁷

In support of its summary judgment motion on the punitive damage claim, and on appeal, defendant relied on the federal district court's opinion in *Mundell v. Beverly Enterprises-Indiana, Inc.*,³⁶⁸ in which Judge Tinder held that the Survival Statute prohibits a personal representative from seeking punitive damages in a personal-injury action brought on behalf of the decedent's estate.³⁶⁹ The court of appeals noted that although it is not bound by federal court decisions interpretation of Indiana law, it gives them "respectful consideration" to assist in "coming to the ultimate conclusion of what the law is in Indiana on a particular issue."³⁷⁰ After providing a brief analysis with respect to the legislative history of Indiana's Survival Statute and the interpretative limitations imposed on both the legislature and the courts by Indiana's common law, the court of appeals respectfully disagreed with Judge Tinder's interpretation for the reason that it did not find the statute to be ambiguous and consequently in need of judicial interpretation.³⁷¹

In *Mundell*, Judge Tinder observed that the amended language of Indiana's Survival Statute allows recovery by the decedent's personal representative of any damages resulting from personal injury from which the decedent could have recovered had he lived.³⁷² Judge Tinder also observed that while punitive damages are not explicitly excluded, they are also not explicitly included.³⁷³ The court of appeals, however, stated that although Judge Tinder may have been correct in stating that punitive damages do not result from personal injury and instead arise from a defendant's egregious conduct, it could not agree that the legislature did not intend to include punitive damages among "all" the damages "resulting before the date of death from those injuries that the decedent would have been entitled to recover had the decedent lived."³⁷⁴ The court reasoned that had the decedent lived, he unquestionably would have been entitled to seek punitive damages as a means of punishing the defendant for its allegedly oppressive conduct that may have caused his injuries.³⁷⁵

The court of appeals additionally noted that public policy concerns impacted

366. See *id.* at 22.

367. See *id.*

368. 778 F. Supp. 459 (S.D. Ind. 1991).

369. See *id.* at 462.

370. *Foster*, 716 N.E.2d at 25 (citing *Miller v. Cilts*, 463 N.E.2d 257, 263 (Ind. 1984)).

371. See *id.* at 26.

372. See *Mundell*, 778 F. Supp. at 462.

373. See *id.*

374. *Foster*, 716 N.E.2d at 27.

375. See *id.*

this decision. Specifically, the court found that a tortfeasor would merely have to outlast a dying potential plaintiff to avoid liability for punitive damages under Judge Tinder's reasoning in *Mundell*.³⁷⁶ The court declined to adopt such a position. Accordingly, it held that section 34-9-3-4 of the Indiana Code, Indiana's Survival Statute, allows for the recovery of punitive damages by the personal representative of the decedent's estate.³⁷⁷

V. MEDICAL MALPRACTICE

The Indiana Court of Appeals and Indiana Supreme Court decided several significant cases concerning medical malpractice during this survey period.

A. Scope of the Medical Malpractice Act

The Indiana Court of Appeals decided two cases in which the scope of the Medical Malpractice Act was addressed. First, in *M.V. v. Charter Terre Haute Behavioral Health System, Inc.*,³⁷⁸ the court of appeals held that a patient's false imprisonment claim fell within the scope of the Medical Malpractice Act. In *M.V.*, the patient, M.V., voluntarily admitted himself to Charter because he was suicidal and depressed. During the initial interview it was discovered that M.V. was experiencing marital, financial, and health problems.³⁷⁹ Dr. Harshawat, M.V.'s attending physician, reviewed the findings and ordered M.V. to be admitted to the skilled adult unit on a suicide watch. M.V. signed several consent forms and was prescribed medications. That night M.V. was told to put on a hospital gown and sleep on a thin mattress on the floor. During his stay at Charter, M.V. participated in various forms of therapy, including medication therapy. He was diagnosed with major depression - suicidal.³⁸⁰ He was instructed to write a letter to his wife stating all of his guilt about an affair and to writing the pros and cons of divorcing his wife. M.V. then left Charter on a day pass and did not return.³⁸¹

M.V. filed a complaint against Charter alleging that he had been unlawfully detained and forced to take medication. Charter responded by claiming that M.V. had failed to comply with the procedural requirements of Indiana's Medical Malpractice Act and that the trial court lacked subject matter jurisdiction to hear the complaint because the Act required that a Medical Review Panel be formed and a Panel opinion issued before M.V. could bring an action in state court.³⁸² Charter then filed a motion to dismiss for lack of subject matter jurisdiction. M.V. responded claiming that Charter's tortious acts of false imprisonment were unrelated to the promotion of his health or its exercise of professional expertise,

376. *See id.*

377. *See id.* at 28.

378. 712 N.E.2d 1064 (Ind. Ct. App. 1999).

379. *See id.* at 1065.

380. *See id.*

381. *See id.*

382. *See id.*

skill, or judgment and therefore fell outside the purview of the Act. Charter responded that the complained of actions were all healthcare related decisions governed by the Act. The trial court dismissed M.V.'s complaint for lack of subject matter jurisdiction, and M.V. appealed.³⁸³

The court of appeals found that "merely labeling acts performed by a health care provider as intentional torts does not automatically shield a plaintiff's claim from the procedural mandates of the Act."³⁸⁴ The court noted that Charter's actions such as admitting M.V. as a patient, requesting him to put on a hospital gown, ordering him to sleep on a thin mattress on the floor as a suicide watch, and requiring him to take medication, were all professional judgments made by healthcare providers in psychiatric facilities. Further, discharge decisions were also designed to promote patient health and involved professional judgment and thereby generally fall under the Act.³⁸⁵ However, the court noted that M.V. contended that he submitted a written request to be released from the facility that was denied by Charter. It was noted that there was no indication in the record that M.V. ever acknowledged the existence of the alleged request until his appellate brief. Because M.V. did not properly present the issue of the written request to the trial court, the court held that he could not argue this issue on appeal.³⁸⁶

The court went on to find that a waiver notwithstanding, Charter correctly observed that the receipt of a release request gives the facility five days in which to file a written report with the court that there is probable cause to believe that the patient is mentally ill and either dangerous or gravely disabled and requires continuing care.³⁸⁷ Therefore, the court held that even assuming that M.V. had properly submitted a written request for release, he left Charter before the expiration of the statutory five day deadline.³⁸⁸ The court then found that the release issue had been waived and that Charter's actions with respect to M.V. constituted professional services that fell within the purview of the Act and that the trial court correctly determined that it lacked subject matter jurisdiction to hear M.V.'s complaint.³⁸⁹

In another decision by the Indiana Court of Appeals concerning similar issues, the court held that a counterclaim for battery, under the circumstances of the case, did not fall within the coverage of the Medical Malpractice Act. In *Weldon v. Universal Reagents, Inc.*,³⁹⁰ the operator of a red blood cell donor program brought an action against a donor claiming that the donor breached a contract by entering into an agreement with another donor program. The donor filed a counterclaim alleging that the operator committed battery upon her and

383. *See id.* at 1065-66.

384. *Id.* at 1066 (citing *Boruff v. Jesseph*, 576 N.E.2d 1297, 1298 (Ind. Ct. App. 1991)).

385. *See id.*

386. *See id.* at 1067.

387. *See id.* (citing IND. CODE § 12-26-3-5 (1998)).

388. *See id.*

389. *See id.*

390. 714 N.E.2d 1104 (Ind. Ct. App. 1999).

caused her emotional distress.³⁹¹ The trial court dismissed the counterclaim for lack of subject matter jurisdiction holding that it fell within the privy of the Indiana Medical Malpractice Act. The court of appeals reversed holding that the operator was not estopped from raising lack of subject matter jurisdiction and that the donor's counterclaim did not fall within the coverage of the Medical Malpractice Act.³⁹²

Distinguishing prior cases,³⁹³ the court held that the donor did not have a physician-patient relationship with the operator and did not seek medical treatment.³⁹⁴ Instead, the donor participated in the operator's program. The fact that the operator may be considered a healthcare provider for purposes of the Act does not, alone, bring the donor's counterclaim within the privy of the Act.³⁹⁵ Here, the donor responded to an advertisement seeking participants in a red blood cell donor program. There were no facts before the court that the donor suffered from any medical condition or that she went to the operator in search of medical treatment or care. The court concluded that the donor was not a patient for purposes of the Act and that the trial court erred when it so found.³⁹⁶ The court further found that a physician-patient relationship was necessary to bring the donor's claims under the procedures of the Act.³⁹⁷

Similarly, in determining what is and is not covered under the Medical Malpractice Act, the Indiana Court of Appeals in *Emergency Physicians v. Pettit*,³⁹⁸ held that a medical malpractice plaintiff who has received judgment for the maximum amount available under the Medical Malpractice Act, may not be awarded prejudgment interest in addition to that statutory cap.³⁹⁹ The court noted that it had no quarrel with the general proposition that prejudgment interest may be awarded on the judgment entered on a claim of medical malpractice.⁴⁰⁰ However, the court was presented with the question as to whether or not prejudgment interest could be awarded where a party received a judgment in the maximum amount recoverable under the Act.

In analyzing the concept of prejudgment interest, the court found that it represented an element of complete compensation; it was not simply an award of interest on a judgment but rather was recoverable as additional damages to accomplish full compensation.⁴⁰¹ The court further found that, in the context of a medical malpractice action, the "additional damages" aspect of prejudgment

391. See *id.* at 1106.

392. See *id.* at 1110.

393. See *Boruff v. Jesseph*, 576 N.E.2d 1297, 1298 (Ind. Ct. App. 1991).

394. See *Weldon*, 714 N.E.2d at 1110.

395. See *id.*

396. See *id.*

397. See *id.*

398. 714 N.E.2d 1111 (Ind. Ct. App.), *aff'd in part and vacated in part*, 718 N.E.2d 753 (Ind. 1999).

399. See *id.* at 1114.

400. See *id.*

401. See *id.*

interest compelled the conclusion that the interest was necessarily a part of the award for an occurrence of medical negligence or an amount recovered for an injury or death.⁴⁰² “Stated differently, the interest is a part of the judgment to which it is attached.”⁴⁰³

In contrast, the court held that attorney’s fees ordered to a prevailing party against a party whose actions or defense is frivolous, unreasonable or groundless, or litigated in bad faith were part of the damage award and could be collected in addition to the statutory cap.⁴⁰⁴ However, the court found that attorney’s fees were not properly awarded under the facts of the case.⁴⁰⁵

An Indiana Supreme Court case decided later in 1999 may cause some confusion as to the court’s holding in *Pettit*. In *Poehlman v. Feferman*,⁴⁰⁶ the supreme court held that post-judgment interest on a judgment could be collected against the healthcare provider and the Indiana’s Patient Compensation Fund (“the Fund”) and that the statutory cap on damages did not include post-judgment interest and court costs.⁴⁰⁷ The court found that the Medical Malpractice Act limited only damage amounts and that the court must decide who was responsible for paying the interest, costs, and other expenses which the court referred to as “collateral litigation expense.”⁴⁰⁸ The court noted that if it did not find that the Fund or the healthcare provider could be responsible for post-judgment interest, it would give the healthcare provider a blank check to run up collateral litigation expenses to be subsidized with the money for the Patient’s Compensation Fund.⁴⁰⁹ Similarly, if the Fund was not required to pay any amount over the cap, it too would not have any incentive to pay the judgment. The court held that the post-judgment interest statute was fully applicable to a judgment rendered in any amount under the Act against both a qualified healthcare provider and the Fund.⁴¹⁰ Given this decision, it is unclear whether the Indiana Supreme Court would agree with the court of appeals in *Pettit* and find that prejudgment interest is a part of “damages” and is not recoverable in addition to the statutory cap.

In *Sword v. NKC Hospital’s Inc.*,⁴¹¹ the Indiana Supreme Court adopted the formulation of an apparent or ostensible agency test set forth in the Restatement (Second) of Torts section 429.⁴¹² In *Sword*, a medical malpractice action was brought against a hospital based on the negligence of an independent-contractor anesthesiologist in administering epidural anesthetic to an obstetrical patient. The trial court entered judgment in favor of the hospital and an appeal was taken.

402. *Id.*

403. *Id.*

404. *See id.* at 1116.

405. *See id.*

406. 717 N.E.2d 578 (Ind. 1999).

407. *See id.* at 582.

408. *Id.*

409. *See id.*

410. *See id.* at 584.

411. 714 N.E.2d 142 (Ind. 1999).

412. *See id.* at 152.

The trial court held as a matter of law that the hospital could not be held liable for the injuries to the patient because the patient asserted that she was injured through the negligence of an independent contractor physician who practiced at the hospital.⁴¹³ The court of appeals affirmed and an appeal was taken to the Indiana Supreme Court.

The supreme court was confronted with the question of whether an application of the doctrine of apparent or ostensible agency was appropriate and warranted a conclusion that there are genuine issues of material fact in dispute on the issue.⁴¹⁴ The supreme court concluded that the trial court did err when it ruled that the hospital was not liable to the patient because an independent contractor physician assertedly committed the negligent acts and because the record did not establish material issues of fact on the question of causation.⁴¹⁵

The principle issue in the case was whether, under Indiana law, the hospital could be held liable for the alleged negligence of an independent contractor anesthesiologist. After reviewing the basic tort and agency concepts relevant to theories of vicarious liability, as well as the jurisprudence in Indiana and other jurisdictions in the specific context of this case, the supreme court adopted the theory of apparent and ostensible agency formulated in the Restatement (Second) of Torts section 429.⁴¹⁶

First, the court discussed the theory of vicarious liability noting that respondeat superior was the applicable tort theory of vicarious liability.⁴¹⁷ The court noted that one important aspect in applying respondeat superior was differentiating between those who are servants and those who are independent contractors because a master can be held liable for the servant's negligent conduct under respondent superior but could not be held liable for the negligence of an independent contractor.⁴¹⁸ Next, the court addressed the apparent agency doctrine which is mostly associated with contracts and the ability of an agent with apparent authority to bind the principal to a contract with a third party. It noted that in certain instances, apparent or ostensible agency also can be a means by which to establish vicarious liability. One annunciation of this doctrine is set forth in the Restatement (Second) of Agency § 267 which provides:

One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.⁴¹⁹

The court noted that under a section 267 analysis, if, because of the

413. *See id.* at 145.

414. *See id.* at 147.

415. *See id.* at 152.

416. *See id.* at 147.

417. *See id.*

418. *See id.* at 148.

419. RESTATEMENT (SECOND) OF AGENCY § 267 (1958), *quoted in Sword*, 714 N.E.2d at 149.

principal's manifestations, a third party reasonably believes that in dealing with the agent he is dealing with the principal servant or agent and exposes himself to the negligent conduct because of the principal's manifestations, then the principal may be held liable for the negligent conduct.⁴²⁰ The court noted that another similar enunciation of the doctrine was set forth in the Restatement (Second) of Torts section 429, which is captioned "Negligence in Doing Work which is Accepted in Reliance on the Employer Doing the Work Himself."⁴²¹ This section provides:

One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer was supplying them himself or by his servants.⁴²²

Next, the supreme court examined Indiana law in the hospital setting context and noted that the general rule was that hospitals could not be held liable for the negligent actions of independent contractor physicians.⁴²³ The court felt that respondeat superior simply did not apply because the hospitals could not legally assert any control over the physicians.⁴²⁴ However, the holdings of these cases have eroded over time and the courts no longer allow hospitals to use their inability to practice medicine as a shield to protect themselves from liability, noted the court.⁴²⁵ The court found that although Indiana law may support a claim of vicarious liability through apparent or ostensible agency in some instances, the courts in Indiana rarely have considered this doctrine in a hospital setting and have never applied it to hold a hospital liable for the acts of an independent contractor physician.⁴²⁶ Rather, Indiana courts have continued to limit hospital liability under the doctrine of respondeat superior and have focused on the question of whether the alleged acts of negligence were committed by an employee of the hospital or by an independent contractor.⁴²⁷ If it were the latter, the courts have held that the hospital cannot be held liable for those actions.⁴²⁸ The court then examined the law in other jurisdictions noting that courts have held hospitals liable for the negligence of independent contractor physicians under apparent agency and have many times adopted section 267 of the Restatement, section 429 or both.⁴²⁹

420. See *Sword*, 714 N.E.2d at 149.

421. *Id.*

422. RESTATEMENT (SECOND) OF TORTS § 429, quoted in *Sword*, 714 N.E.2d at 149.

423. See *Sword*, 714 N.E.2d at 149.

424. See *id.*

425. See *id.*

426. See *id.*

427. See *id.* at 150.

428. See *id.*

429. See *id.*

In *Sword*, the court of appeals invited the Indiana Supreme Court to consider the appropriateness of more clearly defining a test and adopting one of the two formulations of the test set forth in the Restatements. The Indiana Supreme Court accepted the invitation and concluded that in the specific context of a hospital setting, Indiana would expressly adopt the formulation of apparent or ostensible agency set forth in the Restatement (Second) of Torts section 429.⁴³⁰ Applying the test to the present case, the court concluded that there were genuine issues of material fact as to whether or not the doctor was an apparent or ostensible agent of the hospital and whether the hospital may be held liable for any of the doctor's asserted negligent acts.⁴³¹

B. Statute of Limitations

The Indiana Supreme Court rendered several decisions during this survey which are significant to the issue of statute of limitations in medical malpractice cases. In the first of these decisions, the court held, in *Martin v. Richey*,⁴³² that the current medical malpractice statute of limitations⁴³³ was invalid as applied to the plaintiff because the plaintiff was unable to discover her tort claim before the expiration of the limitations period. The court held that to bar the plaintiff in *Martin* from pursuing her tort claim would violate both the Privileges and Immunities Clause⁴³⁴ and the Open Courts Law Clause⁴³⁵ of the Indiana Constitution where the plaintiff claimed that the defendant had failed to diagnose and treat breast cancer in a timely manner.⁴³⁶ In *Martin*, the plaintiff had gone to the defendant to have him check a lump in her breast and did not consult with any other doctors after he aspirated the lump.⁴³⁷ Three years later she began to experience increased pain, at which time her medical malpractice claim would have already expired under an occurrence based statute of limitations.⁴³⁸ Declining to strike down the statute of limitations, the court found it invalid as applied to the plaintiff.⁴³⁹ Pursuant to *Martin*, a plaintiff may not possess the pre-science to file a claim before she knows or has reason to know a claim exists.⁴⁴⁰

In a companion case, the Indiana Supreme Court reemphasized that the occurrence based statute of limitations is not unconstitutional, but only unconstitutional as applied to particular plaintiffs. In *Van Dusen, M.D. v.*

430. See *id.* at 152.

431. See *id.*

432. 711 N.E.2d 1273 (Ind. 1999).

433. IND. CODE § 34-18-7-1(b) (1998) (repealing § 27-12-7-1 (1993)).

434. IND. CONST. art. I, § 23.

435. IND. CONST. art. I, § 23; see also *Martin*, 711 N.E.2d at 1285.

436. See *Martin*, 711 N.E.2d at 1277.

437. See *id.* at 1276-77.

438. See *id.* at 1277.

439. See *id.* at 1279.

440. See *id.* at 1284.

Stotts,⁴⁴¹ the plaintiff was also besieged by a disease, the latency of which made it impossible for him to discover the malpractice until after the two year occurrence based statute of limitations had run. The court faced the additional issue of how the statute of limitations could be constitutionally applied.⁴⁴² The court concluded that the statute should apply to limit the time in which such plaintiffs can make a claim against their physician to two years from the discovery of the malpractice or two years from when the plaintiff should have discovered the malpractice using reasonable care and due diligence, whichever is earlier.⁴⁴³

Thus, the Indiana Supreme Court in *Martin* and *Van Dusen* determined that for the statute to be constitutionally applied, the occurrence based statute of limitations would be interpreted to run from the date of discovery for the fixed class of plaintiffs represented by those two cases.

Shortly after these two decisions were rendered, the Indiana Supreme Court issued another opinion concerning the statute of limitations in Medical Malpractice Act cases. In *Harris v. Raymond*,⁴⁴⁴ the patient brought a medical malpractice action against a dentist after discovering that TMJ implants surgically inserted by the dentist had ruptured. The trial court denied the dentist's motion for summary judgment and the dentist appealed. The court of appeals affirmed.⁴⁴⁵ Transfer was granted, and the Indiana Supreme Court held that the dentist had a duty to make reasonable efforts to contact current and former patients to pass along safety alerts regarding TMJ devices issued by the FDA and that the dentist breached that duty.⁴⁴⁶ The court also held that to bar the present action on grounds that the medical malpractice limitations period had expired would be unconstitutional based on the court's recent decision in *Martin*.⁴⁴⁷ Finally, the court held that when the medical malpractice limitations period cannot constitutionally be applied to bar a claim, the plaintiff has two years after the discovery of the malpractice or of those facts which should lead to discovery of the malpractice within which to bring a claim.⁴⁴⁸

In a case factually distinguishable from *Martin* and *Van Dusen*, the Indiana Court of Appeals addressed the statute of limitations applying *Martin*. In *Boggs v. Tri-State Radiology Inc.*,⁴⁴⁹ a deceased patient's spouse sued the employer of the patient's radiologist for medical malpractice and alleged that the radiologist in reviewing the patient's mammogram negligently failed to notice breast cancer. The trial court granted the employer's motion for preliminary determination and

441. 712 N.E.2d 491 (Ind. 1999).

442. *See id.* at 495.

443. *See id.* at 497.

444. 715 N.E.2d 388 (Ind. 1999).

445. *See id.* at 391.

446. *See id.* at 395.

447. *See id.*

448. *See id.* at 395-96.

449. 716 N.E.2d 45 (Ind. Ct. App. 1999), *trans. denied*, No. 82A04-9809-CV-450, 2000 Ind. LEXIS 173 (Ind. Feb. 17, 2000).

the spouse appealed.⁴⁵⁰ The court of appeals held that the plaintiff in *Boggs* represented a different class of plaintiffs than in *Martin* and *Van Dusen*.⁴⁵¹ Here, the plaintiff discovered the defendant's alleged malpractice within the two years of the alleged malpractice. In fact, the plaintiff had eleven months following the discovery to file his claim in accordance with the Medical Malpractice Act. The trial court had concluded this and rested its judgment of dismissal, in part, on this fact.⁴⁵² The court of appeals found that applying *Martin* and *Van Dusen* to the facts of *Boggs* was problematic as the decisions in those cases were written in specific rather than general terms.⁴⁵³ Justice Robb, writing for the court of appeals, concluded from the language in *Van Dusen* and *Martin* that the Indiana Supreme Court's holdings were specifically limited to plaintiffs who could not have discovered the malpractice within the occurrence based statute of limitations.⁴⁵⁴ The issue before the court in *Boggs*, however, was one which Justice Robb believed was left open by *Martin* and *Van Dusen*, which was: "whether plaintiffs who discover the malpractice during the occurrence based statute of limitations but file their claim after the same has expired may also bring their action within two years of discovering the malpractice."⁴⁵⁵ Justice Robb concluded that they may.⁴⁵⁶

Justice Robb went on to note that there were two possible interpretations of *Martin* and *Van Dusen*. First, they only apply to those plaintiffs who could not have discovered the alleged malpractice within two years of the same.⁴⁵⁷ Or, the second interpretation would be to apply their two year discovery based statute of limitations to all medical malpractice plaintiffs.⁴⁵⁸ The court of appeals concluded that the latter reading more appropriately applied the rationale behind the Indiana Supreme Court's holdings in *Martin* and *Van Dusen*.⁴⁵⁹ Transfer was granted in February 2000, and the decision by the supreme court will clarify the ruling's interpretation.

Two other companion decisions were rendered by the Indiana Supreme Court during the survey addressing the statute of limitations and medical malpractice cases. In both cases, the Indiana Supreme Court followed and reaffirmed its holding in *Martin*.⁴⁶⁰

450. See *id.* at 46.

451. See *id.* at 74.

452. See *id.* at 47.

453. See *id.*

454. See *id.*

455. *Id.*

456. See *id.* at 48.

457. See *id.* at 49.

458. See *id.*

459. See *id.*

460. See also *Albi v. Weinberg*, 717 N.E.2d 876 (Ind. 1999); *Weinberg v. Bess*, 717 N.E.2d 584 (Ind. 1999) (both cases holding that the medical malpractice action accrued when the patient discovered that the implants contained silicon, not several years earlier when the physician-patient relationship terminated).

It should also be noted in the medical malpractice area that, during the survey period, section 34-18-15-3 of the Indiana Code was amended to increase the limits that a healthcare provider or his insurer must pay before funds can be reached by the Indiana Patient's Compensation Fund. Previously, the limit had been \$100,000 and the limit has now been raised to \$250,000. The statute was effective July 1, 1999.

VI. DEFAMATION

The Indiana Court of Appeals decided several cases on the issue of defamation during the survey period. However, prior to rendering those decisions, the U.S. District Court for the Southern District of Indiana, Indianapolis Division, issued an opinion in January 1999 which provides a good discussion on Indiana law on defamation and invasion of privacy. In *St. John v. Town of Ellettsville*,⁴⁶¹ a former manager of a town sewage plant brought an action under section 1983 against the town and members of the town counsel alleging that they violated his right to due process by terminating his job without providing him notice and a meaningful opportunity to be heard.⁴⁶² In addition, he brought state law claims for breach of contract, defamation, and invasion of privacy. Both sides moved for summary judgment. The court held, among other things, that the counsel president's statements were not defamatory.⁴⁶³ The statements at issue were ones that were made to a newspaper reporter. The newspaper published a front page article entitled "Ellettsville in danger of sewer hook-on ban, Town officials scrambling to clean up problems before state stops growth."⁴⁶⁴

The defendants claimed that the defamation and invasion of privacy claims failed because the plaintiff never demonstrated that the allegedly defamatory statements placed the plaintiff in a false light. The defendants also invoked various forms of immunity, including qualified, legislative and discretionary function immunity.

The court found that the plaintiff's state law claims for defamation and invasion of privacy both "suffer so substantial and evidentiary infirmity that we must find for the defendant as a matter of law."⁴⁶⁵ After reviewing Indiana law on defamation, the court found that the following passage in the newspaper which provided the basis for the defamation and invasion of privacy claims, did not provide an evidentiary basis for plaintiff's claims:

[Town Counsel President] DeFord was shocked to learn the violations IDEM outlined. "I thought it was unbelievable," he said. "As a board we are ultimately responsible. We just assumed everything was being done as it should be."

461. 46 F. Supp.2d 834 (S.D. Ind. 1999).

462. *See id.* at 836.

463. *See id.* at 839.

464. *Id.*

465. *Id.* at 848.

When board members learned of the threat of heavy fines, they convinced state officials to give them a second chance to get things back on track.

"There are these violations that the town has made that we are correcting and the board's feeling was that by privatizing those things will be taken care of," DeFord said. "I am not pointing any fingers, but there were things that went undone. And I am not saying anything about Fred St. John."⁴⁶⁶

The plaintiff contended that the statement that the defendant was "not saying anything" about the plaintiff did just the opposite by associating the plaintiff with the violations and the things that went undone.⁴⁶⁷ Plaintiff claimed that the statements and the reasonable imputations were false and made intentionally and maliciously. Thus, the plaintiff concluded that the statements both defamed him and invaded his privacy by unreasonably placing him in a false light before the public.⁴⁶⁸

The court, however, found, as a matter of law, that the statement, understood in the context of the entire passage, could not reasonably be read as defamatory.⁴⁶⁹ Viewed in the context of the entire article, which the plaintiff chose not to provide in his brief, it was clear to the court that the implication of the defendant's statement was not to associate the plaintiff with violations and things that were undone.⁴⁷⁰ The court found that even if the defendant's statement could reasonably be interpreted as defaming the plaintiff, the plaintiff came "nowhere close to demonstrating that [defendant] uttered his statements falsely and with actual malice."⁴⁷¹ The court then examined the law concerning malice.

The court next addressed the plaintiff's "false light" invasion of privacy claims and found that they fell "ill of the same superficial treatment he gives to his defamation claim."⁴⁷² The court cited *Doe v. Methodist Hospital*,⁴⁷³ for discussion of Indiana's recognition of the "public disclosure of private facts" and the tort of invasion of privacy. The court found that instead of addressing or referencing the body of case law concerning "false light," the plaintiff alleged "hallowly" that the "false public statements made by [defendant] individually constitute publicity which has unreasonably placed [plaintiff] in a false light before the public."⁴⁷⁴ The court found that these "skeletal allegations dictate the

466. *Id.* (citation omitted).

467. *See id.*

468. *See id.*

469. *See id.*

470. *See id.* at 848-49.

471. *Id.* at 849.

472. *Id.* at 850.

473. 698 N.E.2d 681 (Ind. 1997) (discussed in last year's survey edition).

474. *St. John*, 46 F. Supp. at 851-52 (citations omitted).

granting of defendant's summary judgment motion."⁴⁷⁵

Although the district court in *St. John* found, as a matter of law, that the statements were not defamatory when examined in light of all of the statements made, the Indiana Court of Appeals in *Davidson v. Perron*,⁴⁷⁶ refused to grant similar relief at an earlier stage in the litigation—the filing of a motion to dismiss. In *Davidson*, the court found that a motion to dismiss was improperly granted on allegedly defamatory statements and that it could not be determined at that early stage whether or not statements made by the mayor concerning a police officer were defamatory as a matter of law.⁴⁷⁷ The trial court had granted a motion to dismiss as to the statement that the plaintiff was “soft on crime” but denied the motion as to the statement that the plaintiff “has abused privileges given to police officers.”⁴⁷⁸ The communication at issue was the statement that “police certainly have privileges, but I do not believe that they should be abused in the way that some officers like Davidson have done.”⁴⁷⁹ The Indiana Court of Appeals found that considering the statement in context, and according to the idea that the statement was calculated to convey to the public, it would not hold that the statement was not defamatory as a matter of law.⁴⁸⁰ The court noted that this was no minor charge against the police officer and that issues existed as to whether or not the communication was defamatory. The court stated that “unlike the dissent, we are unwilling to arbitrarily “draw the line” between free expression and defamation under the circumstances presented and at this early procedural stage.”⁴⁸¹ The court expressed no opinion whether or not summary judgment might be appropriate after the facts had been more thoroughly developed.⁴⁸² Although it concurred with the majority's resolution of some of the issues, the dissent believed that the majority failed to view the statement in context and failed to look at the idea that the statement was calculated to convey. The dissent concluded that the trial court's decision should be revised and the case remanded for dismissal of the plaintiff's defamation claim for failure to state a claim upon which relief could be granted.⁴⁸³

Similarly, in *Kitco, Inc. v. Corporation for General Trade d/b/a WKJG-TV 33*,⁴⁸⁴ the Indiana Court of Appeals held that claims for defamation by an automobile parts manufacturer and its chief executive officer against a television station for broadcasting a news story on the termination of five employees, could

475. *Id.*

476. 716 N.E.2d 29 (Ind. Ct. App. 1999), *trans. denied*, No. 43A03-9902-CV-63, 2000 Ind. LEXIS 125 (Ind. Feb. 17, 2000).

477. *See id.*

478. *Id.* at 37.

479. *Id.*

480. *See id.* at 38.

481. *Id.*

482. *See id.*

483. *See id.* at 38 (Kirsh, J., concurring in part and dissenting in part).

484. 706 N.E.2d 581 (Ind. Ct. App. 1999).

not withstand a motion for summary judgment.⁴⁸⁵ The court held that the evidence did not establish that the television station acted with "actual malice" in broadcasting the allegedly defamatory news story.⁴⁸⁶ The court found that the CEO's denial of the employees' allegations did not automatically make their claims untrue, nor did his denial prove, as a matter of law, that the broadcasts were made with actual malice.⁴⁸⁷ Rather, the court found that there were contradictory stories regarding why employees were terminated and that the plaintiff had failed to show the court how the station's decision to believe the employees' version amounted to actual malice.⁴⁸⁸ The court further noted that while the station may not have investigated the story as thoroughly as plaintiffs may have wished, and while some of the statements made were misleading, there was not sufficient evidence to demonstrate that the station had knowledge that the story was false or that the station entertained serious doubts as to the truth of the story.⁴⁸⁹ The court held that to establish recklessness, it was not sufficient to just show that the reporting in question was speculative or even sloppy.⁴⁹⁰

Upon reviewing *St. John, Davidson, and Kitco*, there appears to be a pattern that while the courts may be willing to grant summary judgment to a defendant on a claim for defamation, a defendant is not likely to prevail at an earlier stage on a motion to dismiss.

In *Brazauskas v. Fort Wayne-South Bend Dioceses, Inc.*,⁴⁹¹ the Indiana Court of Appeals was confronted with resolving the issue of defamation along with First Amendment issues concerning freedom of religion. Brazauskas entered into an employment contract with the parish whereby she was hired as a director of religious education. Several employment contracts were signed and she was later hired as the pastoral associate.⁴⁹² The contract contained provisions regarding dismissal. After several years of employment, Martelli became the parish pastor. He met with Brazauskas and gave her the choice of either resigning or being fired from her position. He then fired her; however, the circumstances surrounding the firing were vigorously disputed by the parties.⁴⁹³ Brazauskas alleged that Martelli's stated reasons for the firing was that she intimidated him, they were not getting along, and that he did not like working with her. The defendant claimed that Brazauskas was fired for her expression of unorthodox theological views and conduct offensive to church teachings.⁴⁹⁴ Brazauskas filed suit, and the defendants filed a motion to dismiss that was denied. Brazauskas filed an amended complaint and claimed that Martelli had, among other things,

485. See *id.* at 589.

486. *Id.*

487. See *id.*

488. See *id.* at 589.

489. See *id.* at 590.

490. See *id.*

491. 714 N.E.2d 253 (Ind. Ct. App. 1999), *trans. denied*, 726 N.E.2d 313 (Ind. 1999).

492. See *id.* at 255-56.

493. See *id.* at 256.

494. See *id.*

unlawfully, untruthfully, and intentionally made misleading and slanderous remarks about her and implied that there was something of a bad and sinister nature about her thereby causing her irreparable harm.⁴⁹⁵ Defendants asserted that the trial court lacked subject matter jurisdiction to hear Brazauskas' claim and that any statements made by the defendants were privileged. Defendants then filed a motion for summary judgment claiming that the trial court lacked subject matter jurisdiction.⁴⁹⁶

The church argued that the First Amendment to the U.S. Constitution, applicable to the courts of Indiana by the Fourteenth Amendment to the U.S. Constitution, prohibited the trial court from exercising judicial authority to hear the plaintiff's claims in that her primary duties had been "religious and clerical" and her claims were inextricably linked to the circumstances of her termination as an ecclesiastical matter that could not be considered by the trial court.⁴⁹⁷ Brazauskas opposed the motion, arguing that no doctrinal issue was at stake that would prevent the trial court from addressing her claim. She claimed that the church had gone to extraordinary lengths to misconstrue the matter as a ecclesiastical dispute when in reality it was clearly a breach of contract action.⁴⁹⁸ The trial court granted the defendants' first motion for summary judgment and noted that the plaintiff's position was pastoral and her duties involved the preservation and propagation of the Catholic faith. The trial court also noted that the firing of a pastor was an ecclesiastical matter, concluding that the First Amendment rendered Brazauskas' contract illusory.⁴⁹⁹ Defendants then filed a third motion for summary judgment asserting that the trial court lacked subject matter jurisdiction to hear Brazauskas' defamation claim on First Amendment grounds. They argued that an examination of the alleged defamatory statements would require an evaluation of Brazauskas' actions in an ecclesiastical light and could not be examined without reference to church teachings and governess.⁵⁰⁰ Defendants also asserted that the statements were protected by qualified privilege and common interest.⁵⁰¹

As to the defendants' third motion for summary judgment concerning defamation, the court noted the following statements concerning the firing of Brazauskas which were allegedly defamatory:

"She cannot be trusted with seven year old children"

"That the reasons for her termination were personal and confidential"

"She is incapable of Christian ministry and had a vindictive heart"⁵⁰²

The court noted that in the instant case, Brazauskas argued that the defendants' alleged statements constitute a defamation of character to be decided

495. *See id.*

496. *See id.*

497. *Id.* at 257.

498. *See id.*

499. *See id.*

500. *See id.*

501. *See id.*

502. *Id.*

by neutral principals of law. However, the defendants claim that the First Amendment prevents civil courts from exercising jurisdiction over claims related to the employment of church employees whose duties are primarily religious. The court found that the initial determination of whether a communication is defamatory is a question of law for the court.⁵⁰³ In conducting this analysis, however, the court concluded that the trial court would be engaging in an impermissible scrutiny of religious doctrine.⁵⁰⁴ The court held that:

Both society and the state have rightfully conferred significant importance on the protection of an individual's personal and professional reputation, even to the point of restricting the rights of others to communicate freely in this regard. However, when officials of a religious organization state their reasons for terminating a pastoral employee in ostensibly ecclesiastical terms, the First Amendment effectively prohibits civil tribunals from reviewing these reasons to determine whether the statements are either defamatory or capable of a religious interpretation related to the employee's performance of her duties.⁵⁰⁵

The court of appeals held that the First Amendment prevented the court from scrutinizing the possible interpretation of defendants' statements and their purported reasons for uttering them, and that to conclude otherwise would effectively thrust the court into the forbidden role of arbiter of a strictly ecclesiastical dispute over the suitability of a pastoral employee to perform her designated responsibilities.⁵⁰⁶ The court found that the trial court erred in granting defendants' third motion for summary judgment because it never had subject matter jurisdiction to decide Brazauskas' defamation claim.⁵⁰⁷

In another defamation case which involved jurisdictional issues, the Indiana Court of Appeals, in *Samm v. Great Dane Trailers*,⁵⁰⁸ addressed the issue of whether the Worker's Compensation Board had exclusive jurisdiction to determine whether an employer had made defamatory statements while adjusting or settling a former employee's claim for compensation.

In *Great Dane*, Samm, a Great Dane employee, injured his lower groin area while on the job. He went to his family doctor and was advised that he had a hernia which required surgery. He was referred to a general surgeon for evaluation and a company physician confirmed the diagnosis.⁵⁰⁹ He requested worker's compensation benefits and the company responded that it would have to investigate the matter. Samm met with a company representative and was

503. See *id.* at 263.

504. See *id.*

505. *Id.* at 262.

506. See *id.* at 263.

507. See *id.*

508. 715 N.E.2d 420 (Ind. Ct. App. 1999), *trans. denied*, No. 84A01-9810-CV-381, 2000 Ind. LEXIS 66 (Ind. Jan. 26, 2000).

509. See *id.* at 422.

advised that his injury was not work related and that he was being terminated for making a false claim for worker's compensation benefits. He was then terminated.⁵¹⁰ Samm's employer then informed the surgeon that it would pay Samm's surgery costs, so Samm underwent surgery. However, the employer later refused to cover Samm's medical expenses. Samm filed a complaint and alleged that the company had falsely accused him of a criminal act of fraud which accusation constituted libel.⁵¹¹ He also claimed that his discharge was in sole and direct retaliation for his assertion of his right to remedies under Indiana's Worker's Compensation Act. Samm sought compensatory and punitive damages. Samm's employer filed a motion to dismiss for lack of subject matter jurisdiction claiming the Worker's Compensation Board had exclusive jurisdiction. In dismissing the action, the trial court stated that Samm's complaint alleged bad faith and an independent tort against the employer and that these matters were clearly under the jurisdiction of the Worker's Compensation Board.⁵¹²

The court of appeals, referring to Indiana Code section 22-3-4-12, found that the Board did have exclusive jurisdiction over worker's compensation matters, including the bad faith handling of an adjustment of a claim and that the application could be applied retroactively.⁵¹³ However, with respect to the plaintiff's claim for defamation, the court found that there was no well defined and well established public policy in Indiana which dictated that a separate civil action remained available outside of the Board's exclusive jurisdiction for employees making defamation claims.⁵¹⁴ The court found that it was not clear whether the employer's alleged defamatory actions were part of its procedure for "adjusting or settling" Samm's claim.⁵¹⁵ The court noted that what constituted the alleged "publication" element of defamation was important to a finding that the publication involved either the denial of benefits or Samm's termination.⁵¹⁶ Such would help indicate whether the alleged defamatory statements were or were not separate and independent of the employer adjusting or settling benefits. The appellate court found that the trial court did not address this issue and that it was improper for the trial court to have granted the motion to dismiss for lack of subject matter jurisdiction.⁵¹⁷

VII. GOVERNMENTAL IMMUNITY AND TORT CLAIMS ACT

In a case of first impression, the Indiana Court of Appeals in *Barnes v.*

510. See *id.* at 426.

511. See *id.* at 423.

512. See *id.*

513. See *id.* at 426-27.

514. See *id.* at 427.

515. See *id.*

516. *Id.*

517. See *id.*

Antich,⁵¹⁸ held that a municipality was immune from liability under the Indiana Tort Claims Act for operation of an enhanced emergency communication system. In *Antich*, Joseph Antich suffered a heart attack at home. A call was made to 911 which accessed the City of Gary's enhanced emergency communications system. The City's dispatcher answered the call and assured that an ambulance would be dispatched.⁵¹⁹ Approximately ten minutes later, another call was made to 911 and the caller was again assured that an ambulance was on the way. Five minutes later a third call was made, and then a fourth call. The dispatcher repeatedly gave assurances that an ambulance was on the way. However, the City never dispatched an ambulance and Joseph Antich died.⁵²⁰ Joseph Antich's widow brought a wrongful death lawsuit against the City of Gary. The City moved to dismiss the action under section 34-4-16.5-3(17) of the Indiana Code.⁵²¹ The relevant portion of the statute provides as follows:

A governmental entity or an employee acting within the scope of the employee's employment is not liable if a loss results from:

...

The development, adoption, implementation, operation, maintenance, or use of an enhanced emergency communications system.⁵²²

Both the City and Joseph Antich's widow moved for summary judgment. The City of Gary's motion was based on the above statute. The trial court denied the City's motion for summary judgment and granted Antich's motion finding that the City owed Antich a private duty, that the City breached that duty, and that the breach was the proximate cause of Antich's injuries.⁵²³ The matter was then certified for appeal.⁵²⁴

On appeal, the court noted that this case was the first to be decided under section 34-4-16.5-3(17) (later 18) of the Indiana Code.⁵²⁵ The court noted that Indiana's General Assembly had declared that the providing of emergency medical services was a matter of vital concern affecting the public's health, safety and welfare, the provision of which was an essential purpose of the political subdivisions of the State.⁵²⁶ The court also noted that the operation of an emergency dispatch system constituted a governmental function entitled to immunity from tort liability.⁵²⁷ The court found that the operation of such as

518. 700 N.E.2d 262 (Ind. Ct. App. 1998), *trans. denied*, 714 N.E.2d 172 (Ind. 1999).

519. *See id.* at 264.

520. *See id.*

521. This was later recodified under the present subsection 18.

522. *Antich*, 700 N.E.2d at 264.

523. *See id.*

524. *See id.*

525. In a case similar to *Antich*, Judge Barker stated in a concurring opinion that the City would have been immune had it pled the subsection of the Indiana Tort Claims Act as a affirmative defense. *See City of Gary v. Odie*, 638 N.E.2d 1326, 1334-35 (Ind. Ct. App. 1994).

526. *See Antich*, 700 N.E.2d at 265.

527. *See id.*

system involved the making of decisions concerning the seriousness of each call and the order of priority for response which should be attached to the calls.⁵²⁸ The court found that the present case fell squarely within the immunity provided municipalities under the statute.⁵²⁹

In another case of first impression, the Indiana Court of Appeals, in *Wright v. Elston*,⁵³⁰ held that Indiana's Tort Claims Act, as amended in 1995, extended immunity to public defenders.⁵³¹ Previously, the Indiana Court of Appeals had held that Indiana's Tort Claim Act did not apply to a public defender.⁵³² However, since the court's decision in *White*, Indiana's Tort Claims Act was amended⁵³³ and the definition of employee was changed to read as follows:

"Employee" and "public employee" means a person presently or formerly acting on behalf of a governmental entity rather temporarily or permanently or with or without compensation. . . . The term also includes attorneys at law whether employed by the government or entity as employees or independent contractors. . . .⁵³⁴

The court found that the statute extended immunity under the Tort Claims Act to attorneys employed by a governmental entity whether as an employee or as an independent contractor.⁵³⁵ A chief public defender for a county as a full time, salaried employee of the county, would be considered an employee for purposes of a Tort Claims Act.⁵³⁶

In another case, the court of appeals once again addressed who was considered an "employee" under Indiana's Tort Claims Act. In *Williams v. Indiana Department of Corrections*,⁵³⁷ the court found that a fellow inmate was not a "governmental employee" at the time of an accident such that the Department of Corrections was immune from liability for the fellow inmates negligence in opening a defective window.⁵³⁸ In *Williams*, an inmate sued the Department of Corrections for injuries sustained while he was working at a prison facility when he was struck by a defective window that a fellow inmate

528. See *id.*

529. It should be noted that Judge O'Riley dissented, finding that a private duty existed between Antich and the City based on the four requests for emergency assistance and the City repeatedly assuring the caller that an ambulance had been called. Judge O'Riley further noted that "if immunity is allowed in this case, each time a call is made to an enhanced emergency communications system, no matter how egregious the conduct, the government would be immune. I cannot believe that the legislature intended this result." *Id.* at 267 (O'Riley, J., dissenting).

530. 701 N.E.2d 1227 (Ind. Ct. App. 1998), *trans. denied*, 714 N.E.2d 169 (Ind. 1999).

531. See *id.* at 1233.

532. See *White v. Galvin*, 524 N.E.2d 802 (Ind. Ct. App. 1988).

533. The amendment became effective July 1, 1995.

534. *Wright*, 701 N.E.2d. at 1233 (citing IND. CODE § 34-6-2-38 (1998)).

535. See *id.*

536. See *id.*

537. 702 N.E.2d 1117 (Ind. Ct. App. 1998).

538. See *id.* at 1119.

had opened. The inmate contended that the Department of Corrections was vicariously liable for the other inmate's negligence because the other inmate was under the direction and control of a Department employee at the time the accident occurred.⁵³⁹ The court noted that there was no case law in Indiana supporting this argument and that the plaintiff had relied on cases from other jurisdictions.⁵⁴⁰ The court noted that it could conceive of circumstances where a non-governmental employee ordered by a governmental employee to engage in some task would, by the undertaking of the task on behalf of the government, become a governmental employee for purposes of the Tort Claims Act.⁵⁴¹ However, the court refused to conclude that the circumstances in the present case would be sufficient to warrant a finding by the jury that the inmate was acting as a governmental employee and instead found, as a matter of law, that the inmate was not a governmental employee at the time of the accident.⁵⁴²

In *Gregor v. Szarmach*,⁵⁴³ the Indiana Court of Appeals held that where a governmental employee in the course of his duties acts in a manner which disguises or fails to reveal his status as a governmental employee, he may be estopped from asserting the Indiana Tort Claims Act as a bar to a plaintiff actually and reasonably lacking knowledge of the governmental employee's status.⁵⁴⁴ In *Gregor*, a motorist brought an action arising out of an automobile accident. The defendant driver claimed he was driving in the course of his employment for a county agency and moved for summary judgment under the Indiana Tort Claims Act claiming that the motorist failed to comply with the notice requirements of the Act.⁵⁴⁵ Defendant claimed that he was engaged in official county business delivering food stamps and related supplies at the time of the accident. He claims there was a placard on the dashboard of his car stating "Lake County Welfare."⁵⁴⁶ In response, the plaintiff submitted portions of the employee's deposition in which he testified that he was driving his own personal vehicle, the placard was not affixed to the car's dashboard in any way, and he had no idea whether the placard remained in the dashboard after the collision.⁵⁴⁷

The court noted that a district court in Indiana had confronted a similar issue in *Baker v. Schaffer*.⁵⁴⁸ In that case, Judge Dillon noted that he found "no Indiana case law directly addressing the significance of a plaintiff's legitimate and complete ignorance that a defendant is a government employee as that ignorance

539. *See id.*

540. *See id.* (citing *Hall County v. Loggins*, 138 S.E.2d 699 (Ga. 1964); *Wolfe v. City of Miami*, 137 So. 892 (Fla. 1931)).

541. *See id.*

542. *See id.*

543. 706 N.E.2d 240 (Ind. Ct. App. 1999).

544. *See id.* at 243.

545. *See id.* at 241.

546. *Id.*

547. *See id.*

548. 922 F. Supp. 171, 173 (S.D. Ind. 1996).

relates to a plaintiff's failure to comply with the [Tort Claims Act]."⁵⁴⁹ The court found in the present case, as in *Baker*, that the evidence indicated that the defendant was not wearing any type of government uniform, his vehicle did not bear or display any type of identification to indicate it was being operated in the course of government business, and the vehicle was the defendant's personal vehicle.⁵⁵⁰ Here, the court noted that the defendant did not say anything to the plaintiff at the time of the accident about being engaged in government business and that the collision took place on a public thoroughfare.⁵⁵¹ The court held that in a case where a government employee in the course of his duties acts in a manner which disguises or fails to reveal his status as a government employee, he may be estopped from asserting the Indiana Tort Claims Act as a bar to a claim if the plaintiff actually and reasonably lacked knowledge of the government employee's status.⁵⁵²

Similarly, in *Davidson v. Perron*,⁵⁵³ the court, citing *Gregor*, once again held that a party "may not utilize a subterfuge to bar a claim for failure to comply with a notice provision of the ITCA."⁵⁵⁴ In *Davidson*, a police officer petitioned for judicial review of a Board of Public Works decision to terminate him for making unauthorized statements to the press regarding a shooting. The trial court affirmed the Board's decision and the police officer appealed. The court of appeals affirmed the decision.⁵⁵⁵ The police officer then filed an action against the Mayor and City alleging civil rights violations, defamation, and liable. The trial court granted the defendant's motion to dismiss and the police officer appealed.

The court of appeals held that the Mayor and City were estopped from asserting the notice provisions of the Tort Claims Act to bar the officer's defamation claim because the Mayor, in the course of his duties, purposely disguised his identity as the author of the alleged defamatory letter.⁵⁵⁶ The Mayor then prevented the officer from knowing his true identity and status as a governmental employee. The Mayor failed to sign the letter and continued to deny his authorship publically until questioned under oath at a deposition.⁵⁵⁷ The court found that the plaintiff had sufficiently established that the Mayor's deceitful conduct lead to his ignorance that the true author of the alleged defamatory letter was the Mayor which prevented the officer from complying with the notice provisions of the Act.⁵⁵⁸ The court found that the Mayor and City

549. *Id.*

550. *See Gregor*, 706 N.E.2d at 243.

551. *See id.*

552. *See id.*

553. 716 N.E.2d 29 (Ind. Ct. App. 1999), *trans. denied*, No. 43A03-9902-CV-63, 2000 Ind. LEXIS 125 (Ind. Feb. 17, 2000).

554. *Id.* at 34.

555. *See id.*

556. *See id.*

557. *See id.* at 32.

558. *See id.* at 35.

were estopped from asserting the notice provisions of the Act to bar the officer's defamation claim.⁵⁵⁹

VII. FRAUD

During the course of this survey, the Indiana Court of Appeals rendered numerous decisions interpreting Indiana law with respect to claims of actual and constructive fraud. Actual fraud consists of five elements: (1) that there was a material misrepresentation of a past or existing fact; (2) that the representation was false; (3) that the representation was made with knowledge of its falsity; (4) that the complainant relied on the representation; and (5) that the representation proximately caused the complainant's injury.⁵⁶⁰ Constructive fraud consists of: (1) a duty existing by virtue of the relationship between the parties; (2) representations or omissions made in violation of that duty; (3) reliance thereon by the complainant; (4) injury to the complainant as a proximate result thereof; and (5) the gaining of an advantage by the party to be charged at the expense of the complainant.⁵⁶¹

In *Darst v. Illinois Farmers Insurance Co.*,⁵⁶² Sloan was involved in an automobile accident when his van was rear-ended by another vehicle driven by Weger. Sloan was insured by Illinois Farmers, and Weger was insured by Sagamore. After the accident, Sloan had several conversations with a Sagamore adjuster regarding the damage to his van as well as his personal injuries.⁵⁶³ The adjuster told Sloan that \$4000 was the best settlement offer that he could give him. Instead of calling an attorney, Sloan sought the advice of his own insurance agent. The Illinois Farmers' agent told him "you can call an attorney if you want to, but you're not going to get any more money in your pocket. It's only going to go in the attorney's pocket. It's up to you."⁵⁶⁴ The agent further represented to Sloan that in his opinion \$4000 was a fair settlement. Thereafter, without contacting an attorney, Sloan accepted Sagamore's offer and signed a form releasing Sagamore from further liability for Sloan's personal injuries. Sloan subsequently filed bankruptcy and the bankruptcy trustee brought suit against Illinois Farmers.⁵⁶⁵

On appeal, the plaintiff argued that defendant's actions constituted both actual and constructive fraud. The court of appeals noted that each tort requires a misrepresentation of fact and that expressions of opinion are not actionable.⁵⁶⁶

559. *See id.*

560. *See Wells v. Stone City Bank*, 691 N.E.2d 1246, 1250 (Ind. Ct. App.), *trans. denied*, 706 N.E.2d 166 (Ind. 1998).

561. *See id.* at 1250-51.

562. 716 N.E.2d 579 (Ind. Ct. App. 1999), *trans. denied*, No. 49A02-9809-CV-775, 2000 Ind. LEXIS 285 (Ind. Mar. 23, 2000).

563. *See id.* at 580.

564. *Id.* at 581.

565. *See id.* at 580-81.

566. *See id.* at 582.

Further, the court noted that to establish either tort, the complaining party must have had a reasonable right to rely upon the statements made or omitted.⁵⁶⁷ Applying the facts to this law, the court concluded that the agent's statements to Sloan constituted expressions of opinion rather than fact and that Sloan had no reasonable right to rely upon them.⁵⁶⁸

The court reasoned that although a person reasonably expects that his insurance agent will be aware of what is covered under his insurance policy, the advice given by the defendant's agent was not information which could have been ascertained easily by him.⁵⁶⁹ Sloan called to obtain advice about the fairness of a settlement offer, meaning he called to get a subjective opinion. Therefore, the court found that Sloan had no reasonable right to rely upon defendant's agent's subjective opinion as a representation of fact, and that the opinion he solicited and chose to follow, though possibly ill advised, was not actionable.⁵⁷⁰ The court concluded that the advice sought was not related to the essence of the relationship between the two parties and was not a fact related to the policy which Sloan maintained with defendant about which its agent should be expected to know.⁵⁷¹ Rather, it was a request for the agent's advice as a matter outside the limited scope of their relationship. Thus, Sloan had no reasonable right to rely on the agent's opinions as assertions of fact.⁵⁷²

The issue of fraudulent inducement was visited by the Indiana Court of Appeals in *Cacdac v. West*,⁵⁷³ in the context of medical consent to a surgical procedure. In *Cacdac*, the plaintiff claimed that she consented to a surgery based on the defendant doctor's representations that she risked becoming paralyzed if she declined the surgery. She submitted her claim against the physician to the Medical Review Panel and then filed her complaint in the trial court alleging, inter alia, that the physician fraudulently induced her to undergo unnecessary surgery by misrepresenting the risks of foregoing it. The defendant subsequently filed a motion for partial summary judgment directed at this claim.⁵⁷⁴

Defendant argued that any statements he made about the plaintiff's possible future paralysis did not amount to actionable fraud. Defendant first contended that the statements relied upon by the plaintiff were not fraudulent because they were true.⁵⁷⁵ In support of this argument, the doctor submitted an affidavit of a fellow physician indicating that the plaintiff did indeed face the possibility of paralysis. However, the plaintiff countered with an affidavit of a physician who testified that it would be almost impossible for paralysis to result by foregoing

567. See *id.* at 581-82 (citing *Pugh's IGA, Inc. v. Super Food Servs., Inc.*, 531 N.E.2d 1194, 1197-98 (Ind. Ct. App. 1988)).

568. See *id.* at 582.

569. See *id.*

570. See *id.* at 582-83.

571. See *id.*

572. See *id.*

573. 705 N.E.2d 506 (Ind. Ct. App.), *trans. denied*, 626 N.E.2d 306 (Ind. 1999) (mem.).

574. See *id.* at 508.

575. See *id.* at 510.

the surgery. The court noted that to sustain an action for fraud,⁵⁷⁶ it must be proven that a material representation of a past or existing fact was made which was untrue and known to be untrue by the party making it or else recklessly made and that another party did in fact rely on the representation and was induced thereby to act to his detriment.⁵⁷⁷ Applying this law to the facts, the court found that a reading of the plaintiff's expert's affidavit could lead to the conclusion that the physician's statements to the plaintiff that she could become paralyzed from everyday movement were false because they conveyed the misimpression that such an occurrence was likely.⁵⁷⁸ The court of appeals therefore found resolution of the issue inappropriate for summary judgment.⁵⁷⁹

Defendant next argued that the statements were not fraudulent because they did not relate to a present existing fact, but to a future occurrence. The court of appeals noted that one of the elements of a cause of action for fraud is a material misrepresentation of a "past or existing fact."⁵⁸⁰ However, it found that the physician's statements referred to her condition as it existed at the time of their conversation, and this related to a present and existing fact contrary to defendant's argument.⁵⁸¹ Accordingly, the court found genuine issues of material fact relating to the plaintiff's claim of fraud that precluded entry of summary judgment on that claim.⁵⁸²

In *Mid-Continent Paper Converters, Inc. v. Brady, Ware & Schoenfeld, Inc.*,⁵⁸³ the court of appeals interpreted the attribution of fraud to a corporation. In this case, an accounting firm brought suit against a corporate client for unpaid fees, and the corporation counterclaimed alleging that the accounting firm had committed professional malpractice for failing to discover fraud committed by the corporation's Chief Financial Officer.⁵⁸⁴ The trial court entered summary judgment in favor of the plaintiff on defendant's counterclaim, holding that the fraud perpetrated by Gleeson, the corporation's Chief Financial Officer, against the plaintiff was imputed to defendant because Gleeson committed fraud on behalf of defendant while in the scope of his employment and the fraud committed by Gleeson is therefore the fraud of defendant.⁵⁸⁵ In addition, the trial court held that since defendant committed fraud against the plaintiff, defendant could not recover damages from the plaintiff because the plaintiff was also a victim of the fraud committed by defendant.⁵⁸⁶

576. See *id.*

577. See *id.* at 509-10 (citing *Fleetwood Corp. v. Mirich*, 404 N.E.2d 38, 42 (Ind. Ct. App. 1980)).

578. See *id.* at 510.

579. See *id.*

580. *Id.* (citing *Fleetwood Corp.*, 404 N.E.2d at 42).

581. See *id.*

582. See *id.*

583. 715 N.E.2d 906 (Ind. Ct. App. 1999).

584. See *id.* at 908.

585. See *id.*

586. See *id.*

With respect to the issue of imputation of fraud, the court of appeals looked to Indiana agency law for the conclusion that the actions of employees and agents of a corporation are attributable to the corporation when the actions are done within the scope of employment.⁵⁸⁷ However, it acknowledged that an employer will not be liable for the actions of its agent if the agent commits an independent fraud for his own benefit or the agent's conduct raises a presumption that the agent would not communicate his knowledge.⁵⁸⁸

In the case of fraud by the employee on behalf of a corporation, the court of appeals recognized that the issue of whether a company benefits from an employee's fraud becomes complicated in two situations: (1) a "loyal but misguided" employee who intended to benefit the corporation by his fraudulent acts and did produce a short term benefit may ultimately cause real damage to the company even before the fraud is unmasked; and (2) the employee may also have his own interests while the employee's fraud serves the interest of the corporation.⁵⁸⁹ After a brief discussion of how these concerns have been treated in other jurisdictions and by the Restatement (Second) of Agency section 261, the court stated that it did not find the enrichment of the corporation to be a dispositive element.⁵⁹⁰ Rather, a finding that the agent or employee acts on the corporation's behalf and within the scope of authority is more relevant criteria in determining if an employee's fraud is imputable.⁵⁹¹ Moreover, the court found that it is not a requirement that the employee be top management in order to impute fraud, although the employee's position in the company is certainly a factor in analyzing whether the fraud will be attributable to the corporation.⁵⁹² Applying this law to the facts, the court held that the chief financial officer committed fraud on behalf of the company, which was intended to benefit the company and did benefit the company.⁵⁹³ The court further held that although Gleeson was not a shareholder nor a business decision maker, it believed that his position of authority sufficiently enabled him to act on behalf of defendant and thus his fraud should be attributed to the company.⁵⁹⁴

With respect to defendant's counterclaim against the plaintiff for professional malpractice, the court held that it was not clearly erroneous for the trial court to find that the plaintiff was a victim of the fraud committed by Gleeson on behalf of defendant, and that defendant could not recover damages from the victim of its own fraud.⁵⁹⁵ The court agreed that imputation of fraud is not necessarily an absolute defense to malpractice claims against auditors under

587. See *id.* at 909 (citing *Bud Wolf Chevrolet v. Robertson*, 519 N.E.2d 135, 137 (Ind. 1988)).

588. See *id.* at 909-10 (citations omitted).

589. *Id.* at 910.

590. See *id.* at 911 (citing RESTATEMENT (SECOND) OF AGENCY § 261 (1958)).

591. See *id.* at 911.

592. See *id.* at 912.

593. See *id.* at 913.

594. See *id.*

595. See *id.*

all circumstances.⁵⁹⁶ However, because the court found that the plaintiff was entitled to rely and did rely on the truthfulness of Gleeson's representations on behalf of defendant, defendant was barred from recovery on its counterclaim for damages.⁵⁹⁷

The opinions rendered by the Indiana Court of Appeals during the course of this survey period demonstrate the wide array of factual circumstances upon which individuals may seek recovery under the tort of fraud. Likewise, they clarify the boundaries to which our courts are willing, or unwilling, to extend its application.

596. See *id.* at 912.

597. See *id.* at 912-13.

SURVEY OF 1999 INDIANA CASES ON THE UNIFORM COMMERCIAL CODE

JUDY L. WOODS*

INTRODUCTION

In 1999, the Indiana Supreme Court addressed Article 9 of the Uniform Commercial Code ("UCC")¹ in only one case,² and did not construe any other portions of the UCC. That case deals with the competing interests of a secured creditor and a third party receiving proceeds from the transfer of collateral.³ In addition, two Indiana Court of Appeals decisions dealt with impairment of collateral and release of a guarantor.⁴

Several decisions of the Indiana Court of Appeals addressed issues concerning warranties and limitation of remedies under Article 2 of the UCC,⁵ the general duty imposed on all contracts covered by the UCC to perform in good faith,⁶ and what is a reasonable notice for termination of a contract.⁷ In addition, the Indiana Tax Court discussed the role and usefulness of the UCC when it is interpreting and construing Indiana tax laws.⁸

None of the 1999 Indiana cases dealing with the UCC represents a significant divergence or major change in Indiana law. Rather, these cases clarify and refine the law, offering helpful points for those engaged in commerce as well as lawyers and judges applying the law.

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1. Indiana's version of the UCC is enacted at IND. CODE § 26-1-1-101 (1998).

2. See HCC Credit Corp. v. Springs Valley Bank & Trust Co., 712 N.E.2d 952 (Ind. 1999).

3. See *id.* at 954.

4. See *Cole v. Loman & Gray, Inc.*, 713 N.E.2d 901 (Ind. Ct. App. 1999); *Alani v. Monroe County Bank*, 712 N.E.2d 19 (Ind. Ct. App. 1999), *reh'g denied*, No. 53A05-9904-CV-154, 1999 Ind. LEXIS 844 (Ind. Ct. App. Sept. 21, 1999).

5. See *Rheem Mfg. Co. v. Phelps Heating & Air Conditioning, Inc.*, 714 N.E.2d 1218 (Ind. Ct. App. 1999), *trans. granted*, No. 49A02-9807-CV-620, 2000 Ind. LEXIS 288 (Ind. Mar. 23, 2000); *Frantz v. Cantrell*, 711 N.E.2d 856 (Ind. Ct. App. 1999); *Town and Country Ford, Inc. v. Busch*, 709 N.E.2d 1030 (Ind. Ct. App. 1999).

6. See *Best Distrib. Co. v. Seyfert Foods, Inc.*, 714 N.E.2d 1196 (Ind. Ct. App. 1999), *trans. granted*, No. 49A04-9802-CV-98, 2000 Ind. LEXIS 286 (Ind. Mar. 23, 2000).

7. See *id.*

8. See *Mynsberge v. Department of State Revenue*, 716 N.E.2d 629 (Ind. Tax 1999); *W.H. Paige & Co. v. State Bd. of Tax Com'rs*, 711 N.E.2d 552 (Ind. Tax), *trans. denied*, 726 N.E.2d 312 (Ind. 1999); *Tri-States Double Cola Bottling Co. v. Department of State Revenue*, 706 N.E.2d 282, 285 (Ind. Tax 1999).

I. USE OF THE OFFICIAL COMMENTS TO THE UNIFORM COMMERCIAL CODE IN STATUTORY CONSTRUCTION AND INTERPRETATION IN INDIANA

In *HCC Credit Corp. v. Springs Valley Bank & Trust*,⁹ the Indiana Supreme Court noted that in adopting the 1972 version of Article 9 of the UCC, the Indiana legislature did not adopt the official comments of the National Conference of Commissioners on Uniform State Laws as authoritative in Indiana.¹⁰ However, Indiana courts and practitioners have often looked to the official comments to the UCC for guidance in interpreting and applying Indiana's version of the UCC.¹¹ Although many states adopted the official comments as part of their statutory enactments of the UCC, Indiana did not.¹² This situation can be contrasted with, for example, the official comments to the Business Corporation Law which "may be consulted by the courts to determine the underlying reasons, purposes, and policies of [the BCL] and may be used as a guide in its construction and application."¹³ The decision not to adopt the official comments to the UCC is similar to the decision by the legislature not to adopt the official comments to other uniform laws.¹⁴ In *HCC*, the court nevertheless looked to the language of the official comments for guidance in applying the statute, noting that comment 2(c) to Indiana Code section 26-1-9-306 "is an exception to the Indiana U.C.C.'s general priority rules."¹⁵

On a related note, the Indiana Tax Court commented in *Tri-States Double Cola Bottling Co. v. Department of State Revenue*,¹⁶ that it may look to Indiana's version of UCC Article 2A in interpreting tax laws and determining the meaning of a lease.¹⁷ Taking a similar approach, in *W. H. Paige & Co. v. State Board of Tax Commissioners*,¹⁸ the tax court looked to Articles 2 and 9 of the UCC in considering whether a transaction creates a lease or a security agreement. However, the tax court held that regardless of how a transaction would be treated under the UCC, it "is only looking to the law of security interests for *guidance* in this area," and that the UCC is not dispositive in issues involving taxation.¹⁹

9. 712 N.E.2d 952 (Ind. 1999).

10. *See id.* at 954.

11. *See id.* at 954, 958 n.1

12. *See* Pub. L. 152-1986.

13. *HCC*, 712 N.E.2d at 955 n.1 (quoting IND. CODE § 23-1-17-5 (1998)).

14. *See id.* (quoting *Benham v. State*, 637 N.E.2d 133, 136 n.3 (Ind. 1994) (commenting on Indiana Penal Code not being a guide for courts because there was no evidence "that it was not adopted or even considered by the legislature")).

15. *Id.* at 954.

16. 706 N.E.2d 282 (Ind. Tax 1999).

17. *See id.* at 285; *see also* *Monarch Beverage Co. v. Department of State Revenue*, 589 N.E.2d 1209, 1212 (Ind. Tax. 1992) (tax court may look to "law of sales for assistance in interpreting tax laws that relate to the sale of goods").

18. 711 N.E.2d 552, 556 (Ind. Tax), *trans. denied*, 726 N.E.2d 312 (Ind. 1999).

19. *Id.* at 560 (emphasis added).

Similarly, in *Mynsberge v. Department of State Revenue*,²⁰ the tax court noted that its conclusion that electricity should not be treated as tangible personal property under the tax laws, may be viewed as being in “tension” with the treatment of electricity as goods under the UCC.²¹ The tax court concluded that “[t]his is not problematic” because the legislature may treat electricity differently under the tax laws and the UCC.²² “Undoubtedly, the UCC is an important body of law; however, in the area of taxation, it gives helpful guidance, not iron-clad orders.”²³

II. ARTICLE 9—SECURED TRANSACTIONS

A. *Competing Interests in Proceeds from Collateral Between a Secured Party and Other Creditors*

In *HCC Credit Corp. v. Springs Valley Bank & Trust*,²⁴ the Indiana Supreme Court addressed the respective rights of a secured party and another creditor when the debtor used proceeds from the collateral of the secured party to voluntarily pay the debt of the other creditor.²⁵ In this case, there was no dispute that the secured party, HCC, had a valid and perfected security interest in proceeds from the sale of the debtor’s tractors.²⁶ After the sale of the tractors, the debtor deposited the proceeds in its general checking account at the bank and then wrote a check to the bank to pay off the debtor’s bank loans, some of which were not yet due.²⁷ The bank did not compel the debtor to make the payment, did not seize or set off against the account, and did not discuss paying off the notes with the debtor before payment was made.²⁸ The debtor did not inform the bank that the source of funds was the sale of tractors in which HCC had a security interest.²⁹ The debtor filed a bankruptcy liquidation proceeding several months after the payment to the bank.³⁰

In weighing the competing interests of the secured creditor and the bank, the court noted there are sound commercial policy considerations in favor of each position.³¹ The secured party should be able to rely on its compliance with the UCC requirements for perfecting a security interest and not run the risk that its

20. 716 N.E.2d 629 (Ind. Tax 1999).

21. *Id.* at 637 n.13.

22. *Id.* at 638.

23. *Id.*

24. 712 N.E.2d 952 (Ind. 1999).

25. *See id.* at 955. UCC § 9-306 deals with a secured party’s rights to proceeds from disposition of the collateral. *See* IND. CODE § 26-1-9-306 (1998).

26. *See HCC*, 712 N.E.2d at 953.

27. *See id.* at 953-54.

28. *See id.*

29. *See id.*

30. *See id.*

31. *See id.* at 955.

interest will be trumped by the unrecorded interest of a bank exercising a right to set off against the debtor's bank account.³² Allowing the bank to take priority over a secured creditor "undercuts significant values of certainty, efficiency, and reliance which are at the heart of the [UCC's] emphasis on public filing."³³

On the other hand, sound policy reasons favor allowing third party transferees (including banks) who receive proceeds of another's collateral in the ordinary course of business to retain such payments.³⁴ The payment to the bank in this case was arguably made in the ordinary course of the debtor's business and was not a payment forced by the bank or a setoff by the bank against the debtor's checking account.³⁵ Imposing liability "too readily" or defining ordinary course of business "too narrowly" could impose substantial burdens on those who do business with a debtor to return payments for routine or ordinary transactions to the secured party.³⁶ The negative impact such a rule of law would have on commerce is obvious.

Strong policy considerations support both positions: "[R]educing the burden on perfected [security interests]" on the one hand, and "reducing the burden on ordinary coarse payees" on the other.³⁷ The goal of the Uniform Commercial Code is to streamline and reduce legal impediments to commerce and to make the legal implications of commercial transactions predictable and consistent.³⁸ In trying to reconcile both policy considerations, the supreme court reaffirmed that the "security interest continues in any identifiable proceeds of collateral including collections received by the debtor," and that "Comment 2(c) [to UCC § 9-306] is the law of Indiana: a recipient of a payment made 'in the ordinary course' by a debtor takes that payment free and clear of any claim that a secured party may have in the payment as proceeds."³⁹

The key to reconciling the two positions is determining when a payment is made in the ordinary course of a debtor's business.⁴⁰ The court held that two factors must be assessed: "(1) the extent to which the payment was made in the routine operation of the debtor's business and (2) the extent to which the recipient was aware that it was acting to the prejudice of the secured party."⁴¹ In applying these two factors to the facts in *HCC*, the court commented on the holding in the *J. I. Case Credit Corp. v. First National Bank*,⁴² noting its general

32. *See id.*

33. *Id.* (quoting *Citizens Nat'l Bank v. Mid-States Dev. Co.*, 380 N.E.2d 1243, 1250 (Ind. Ct. App. 1978)).

34. *See id.* at 956.

35. *See id.*

36. *Id.* (quoting *Harley-Davidson Motor Co. v. Bank of New England-Old Colony, N.A.*, 897 F.2d 611, 622 (1st Cir. 1990)).

37. *Id.*

38. *See id.* at 957.

39. *Id.* at 958 (quoting U.C.C. § 9-306 cmt. 2 (1977)).

40. *See id.*

41. *Id.*

42. 991 F.2d 1272 (7th Cir. 1993).

agreement with the analysis of the Seventh Circuit Court of Appeals.⁴³ However, the court declined to follow *J. I. Case Credit Corp.* for the reason that the Seventh Circuit focused almost exclusively on the awareness of prejudice factor and did not examine the routine operation of the debtor's business factor.⁴⁴ The court added that it did not intend to "impede the free flow of goods and services essential to business,"⁴⁵ and thus further held that a "transfer will be free of any claim that a secured party may have in it as proceeds unless the payment would constitute a windfall to the recipient."⁴⁶ Thus, a third factor, whether the transfer creates a windfall for the recipient, must also be examined.⁴⁷

The court offers helpful guidance for evaluating all three parameters. For example, as to the first factor, the court suggests that payment of sales tax collections or FICA withholdings would be at the routine and ordinary course of business continuum, while payment of subordinated debt that was not yet due would be at the extraordinary, non-routine end of the continuum.⁴⁸ Along that continuum, courts and practitioners may consider the size and frequency of payments; to what extent the payments are routine to the debtor or the transferee or both; whether the debtor received goods or services for the payments; whether any payment was for an obligation that was then due, overdue or not yet due; and other facts specific to the transaction.⁴⁹

The second factor, the extent to which the recipient of the payment was aware of prejudice to the secured party, can also be viewed on a spectrum, ranging from no knowledge to actual fraud and collusion with the debtor in avoiding the obligation to the secured party.⁵⁰ In the central ranges of that spectrum will lie the cases where the transferee is aware that a security interest exists but does not know that the payment derives from the collateral of the secured party to those cases where the transferee has reason to know or even a "strong suspicion" that the payment derives from the collateral.⁵¹ The case where the transferee takes deliberate steps to keep from learning the source of the payment will obviously place the transfer at the far range of the knowledge of prejudice spectrum.⁵² Furthermore, the court suggested that the relationship between the debtor and the transferee may raise a presumption that the transferee is aware of prejudice to the secured party.⁵³ Similarly where the transferee has agreed to be subordinated to the secured party, knowledge of prejudice may

43. See *HCC*, 712 N.E.2d at 958.

44. See *id.*

45. *Id.* (quoting *J.I. Case Credit Corp.*, 991 F.2d at 1277).

46. *Id.*

47. See *id.*

48. See *id.* at 957.

49. See *id.*

50. See *id.*

51. *Id.* at 957-58.

52. See *id.* at 958.

53. See *id.*

generally be presumed.⁵⁴ Whether the transfer creates a windfall for the recipient will depend on the parties' reasonable expectations for payment, including both the amount and timing of payment vis-a-vis other creditors.⁵⁵

The determination as to whether a transfer was made in the ordinary course of the debtor's business is a question of law; however, determination of the routine operation of business, knowledge of prejudice and windfall factors requires factual analysis.⁵⁶ In practice, this issue will usually present mixed questions of fact and law. Applying the three factors to the facts in *HCC*, the court concluded that the payment to the bank was not made in the ordinary course of the debtor's business based on the following undisputed facts: (1) the bank knew that HCC had a valid and perfected security interest in the tractors; (2) the bank knew of this security interest when it extended credit to the debtor; (3) the debtor had refinanced with the bank more than 100 times, with the average debt balance owed being between \$100,000 and \$200,000; (4) after the payment to the bank, the debtor was in the unprecedented position of owing the bank only about \$2000 to \$15,000; (5) a substantial portion of the debt paid off was not yet due to the bank; and (6) the bank's senior loan officer recognized the payment as being "extraordinary" and the largest payment ever made to the bank by the debtor.⁵⁷ The court further concluded based on these facts that the bank would receive a windfall, if it were allowed to retain the payment because the bank had no reasonable expectation of being paid in advance of HCC or at the expense of HCC.⁵⁸ The grant of summary judgment for the bank was reversed and the case remanded for entry of summary judgment in favor of HCC.⁵⁹

B. Impairment of Collateral by the Secured Party

In *Cole v. Loman & Gray, Inc.*,⁶⁰ the appellate court held that failure to perfect a security interest in the collateral for a debt impaired the collateral and entitled the guarantors of the debt to be discharged on a *pro tanto* basis to the extent of the impairment.⁶¹ Failure to perfect a security interest in the collateral is an impairment because it makes the collateral unavailable to the surety, particularly in a case such as this where the debtor has filed a bankruptcy petition. In *Cole*, the court found that the failure to perfect a security interest in the collateral impaired the collateral and entitled the guarantors to be released from their guaranty despite the fact that the creditor had instructed its attorney

54. *See id.*

55. *Id.* at 959.

56. *See id.* at 958.

57. *See id.* at 959.

58. *See id.*

59. *See id.*

60. 713 N.E.2d 901 (Ind. Ct. App. 1999), *reh'g denied*, No. 53A05-9904-CV-154, 1999 Ind. LEXIS 844 (Ind. Ct. App. Sept. 21, 1999).

61. *See id.* at 904-05.

several times to perfect the security interest.⁶² The creditor was bound by the actions or inactions of its attorney agent.⁶³ The court affirmed that an unconditional guaranty is not a waiver of the impairment of collateral defense, and noted that neither the note nor the security agreement contained a waiver or consent provision with respect to impairment of the collateral.⁶⁴ Presumably, inclusion of such provisions in one or both of these documents would have led to a different result.

The *Cole* court did not adopt the theory of *strictissimi juris* to release the guarantor from any liability for the debt,⁶⁵ but released the guarantor only to the extent that the value of the collateral had been impaired.⁶⁶ The court remanded the case to the trial court to determine the value of the collateral at the time of contracting and the amount of the impairment.⁶⁷

In *Alani v. Monroe County Bank*,⁶⁸ a second case dealing with the impairment of collateral by the creditor, the court of appeals held that the guarantor was not discharged despite the bank's failure to record a mortgage securing the debt.⁶⁹ In *Alani*, the bank attempted to record a deed and mortgage on the day after it made a loan to the debtor.⁷⁰ The county auditor refused to transfer the deed on two occasions and erroneously informed the bank that county planning department approval was necessary for transfer of the property.⁷¹ By the time the planning department determined such approval was not necessary and the deed and mortgage were recorded, the debtor had filed for bankruptcy relief.⁷² The property was eventually sold, but the bank sought to recover the shortfall from the guarantor.⁷³

The court focused on whether the collateral securing the debt had been *unreasonably* impaired by the creditor bank and whether the bank's failure to record the mortgage separately, when the auditor refused to transfer the deed, was unjustified.⁷⁴ The court looked to prior case law and Indiana Code section 26-1-3-606 which provides that "[W]hen a creditor releases or negligently fails to protect security put in his possession by the principal debtor, the surety is

62. See *id.* at 904.

63. See *id.*

64. See *id.* at 904 n.2 (citing *Farmers Loan & Trust Co. v. Letsinger*, 652 N.E.2d 63, 67 n.3 (Ind. 1995)).

65. Under the doctrine of *strictissimi juris*, "a surety is completely discharged of any liability under the promissory note where the collateral was impaired whether or not the surety has sustained loss of prejudice as a result of the impairment." *Id.* at 905.

66. See *id.*

67. See *id.*

68. 712 N.E.2d 19 (Ind. Ct. App. 1999).

69. See *id.* at 22.

70. See *id.* at 20.

71. See *id.*

72. See *id.*

73. See *id.*

74. See *id.*

released to the extent of the value of the security so impaired.”⁷⁵

The results in *Cole* and *Alani* are consistent, because in both cases the court focused on whether the creditor (or its agent) was negligent or acted reasonably in failing to perfect a security interest in the collateral. Both cases allow for discharge of the guarantor only when the failure to perfect is unreasonable and only to the extent the collateral is actually impaired.

III. ARTICLE 2—LIMITATION OF WARRANTIES AND REMEDIES

Three 1999 Indiana Court of Appeals decisions addressed warranties under Article 2 of the UCC.⁷⁶ In *Frantz v. Cantrell*,⁷⁷ the court provides a concise summary of the basic elements of a cause of action for breach of the implied warranty of merchantability.⁷⁸ Although this case does not change existing Indiana law, it provides a simple road map for a cause of action of breach of the implied warranty of merchantability.

In *Frantz*, a homeowner brought an action against a roofer for breaching the implied warranty of merchantability under Indiana Code section 26-1-2-314(1) with respect to defective roof shingles used in installing a new roof.⁷⁹ The shingles had no apparent defects and after the roof was installed, Cantrell was satisfied for several months.⁸⁰ However, after the onset of winter, Cantrell noticed the shingles were curling at the edges and the tabs of the shingles were not properly sealed. A representative of Frantz inspected the roof and determined the shingle manufacturer should be contacted.⁸¹ The manufacturer reported that the curling of the edges of the shingles would correct itself when the weather turned warmer, but did not address the issue concerning the sealing of the shingle tabs.⁸² When the curling problem did not correct itself by the time the weather grew warmer, Cantrell tried again to get Frantz to correct the problems.⁸³

In Indiana, the implied warranty of merchantability applies to all goods sold

75. *Id.* at 23 (quoting *White v. Household Fin. Corp.*, 302 N.E.2d 828, 833 (1973)).

76. In addition, in *Town and Country Ford Inc. v. Bush*, the court of appeals affirmed without comment or discussion that “[i]t is well-settled that a dealer of used automobiles may disclaim implied warranties through the use of conspicuous language containing expressions like “as is” or “with all faults” or other language which in common understanding call the buyer’s attention to the exclusion of warranties and makes plain that there is no implied warranty.” 709 N.E.2d 1030, 1033 (Ind. Ct. App. 1999) (citing IND. CODE § 26-1-2-316 (1998); *DeVoe Chevrolet-Cadillac Inc. v. Cartwright*, 526 N.E.2d 1237, 1240 (Ind. Ct. App. 1988)).

77. 711 N.E.2d 856 (Ind. Ct. App. 1999).

78. *See id.* at 858.

79. *See id.*

80. *See id.*

81. *See id.*

82. *See id.*

83. *See id.*

by a merchant, unless it has been expressly disclaimed or limited.⁸⁴ The warranty arises by operation of law for the protection of the buyer and is strictly construed against the seller.⁸⁵ There is no special relationship between a seller and a manufacturer required for the imposition of the warranty.⁸⁶ While the implied warranty of merchantability may be modified by trade practices or uses, such modifications apply only when both the buyer and seller are merchants in the trade or industry specific to the goods at issue, or when both buyer and seller are otherwise aware of the trade or industry-specific modifications to the implied warranty.⁸⁷ In this case, the implied warranty of merchantability, applied without trade limitations or modifications.⁸⁸

Here, the court found that shingles that curl at the edges and do not seal are defective and do not meet the minimum standards required by the implied warranty of merchantability.⁸⁹ Under Indiana Code section 26-1-2-314(2), "merchantable" goods must pass without objection in the trade, be of fair and average quality, and be fit for the ordinary purposes for which such goods are used.⁹⁰ The roof was defective because it did not have a flat, smooth appearance, and it had great potential for failing after only a short time.⁹¹ As such, the shingles did not "conform to ordinary standards and . . . [were not] of the same average grade, quality, and value as similar goods sold under similar circumstances."⁹² Having determined (1) that the sale was the type of sale in which the implied warranty of merchantability arose, and had not been limited or modified by the parties, and

84. See IND. CODE § 26-1-2-314(1) (1998).

85. See *Frantz*, 711 N.E.2d at 859.

86. See *id.*

87. See *id.*

88. See *id.*

89. See *id.* at 860.

90. Indiana Code section 26-1-2-314(2) provides:

- (2) Goods to be merchantable must at least be such as:
- (a) pass without objection in the trade under the contract description; and
 - (b) in the case of fungible goods, are of fair, average quality within the description; and
 - (c) are fit for the ordinary purposes for which such goods are used; and
 - (d) run, within the variations permitted by the agreement, of even kind, quality, and quantity within each unit and among all units involved; and
 - (e) are adequately contained, packaged, and labeled as the agreement may require; and
 - (f) conform to the promises or affirmations of fact made on the container or label if any.

IND. CODE § 26-1-2-314(2) (1998).

91. See *Frantz*, 711 N.E.2d at 860.

92. *Id.* (quoting *Jones v. Abriani*, 350 N.E.2d 635, 645 (Ind. Ct. App. 1976)).

(2) that breach of the warranty was the proximate cause of the buyer's damages, the court looked to Indiana Code section 26-1-2-714(1) to determine the amount of damages.⁹³ The evidence showed that the only way to correct the defects in the shingles was to remove them and install a new roof.⁹⁴ Thus, the award of damages by the trial court was affirmed.⁹⁵

Rheem Manufacturing Co. v. Phelps Heating & Air Conditioning, Inc.,⁹⁶ discusses the provisions of UCC § 2-719 with respect to limitations or exclusions of remedies. In this case, Phelps installed Rheem gas furnaces in residences.⁹⁷ Phelps obtained the furnaces from an authorized distributor of the furnaces.⁹⁸ All of the Rheem furnaces were sold with a limited warranty excluding consequential and incidental damages and providing for limited replacement parts and an exclusion of labor costs.⁹⁹ The agreement between Rheem and its distributor provided that the distributor was an independent contractor and not an agent of Rheem.¹⁰⁰

Under the UCC, parties are generally free to shape their remedies for breach and to exclude or limit remedies and warranties.¹⁰¹ However, at least minimum adequate remedies must be provided for breach.¹⁰² Under the UCC, where circumstances cause a contract term providing for a limited or exclusive remedy to fail of its essential purpose or to operate in a manner to deprive either party of the substantial value of the bargain, the contract provision may be set aside and a remedy supplied by the court.¹⁰³ Similarly, a limited or exclusive remedy that is unconscionable or deprives a party of a fair remedy for breach by the other party may be stricken.¹⁰⁴ Section 3 of UCC § 2-719 expressly provides that parties may limit or exclude their responsibility for consequential damages except in cases involving personal injury or where it would be unconscionable to do so.¹⁰⁵

Courts of various jurisdictions do not agree on whether consequential damages may be recovered when a limited warranty provision fails its essential

93. See *id.* at 860-61. The Indiana Code section 26-1-2-714(1) provides: "Where the buyer has accepted goods and given notification . . . he may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from seller's breach as determined in any manner which is reasonable." IND. CODE § 26-1-2-714(i).

94. See *Franz*, 711 N.E.2d at 861.

95. See *id.*

96. 714 N.E.2d 1218 (Ind. Ct. App. 1999).

97. See *id.* at 1219-20.

98. See *id.* at 1220.

99. See *id.*

100. See *id.*

101. See IND. CODE § 26-1-2-719 (1998).

102. See *id.* § 26-1-2-719(2).

103. *Id.* "Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in I.C. 26-1." *Id.*

104. See IND. CODE § 26-1-2-719(2) cmt. 1 (1986).

105. See *id.* § 26-1-2-719(3) (1998).

purpose and a separate contractual provision excludes consequential damages.¹⁰⁶ Indiana courts have not previously addressed this question.¹⁰⁷

The “independent” view treats sections 26-1-2-713(2) and 26-1-2-713(3) of the Indiana Code as separate and distinct, and has been followed by the majority of jurisdictions.¹⁰⁸ Under this view, a separate provision restricting or precluding consequential damages is enforceable even when other provisions of the contract limiting or excluding certain remedies are not enforceable and the remedy must be supplied by the court.¹⁰⁹

The other view, variously termed the “dependent” or “interdependent” view, treats a limitation on consequential damages as “dependent upon the availability of a limited remedy clause in the same agreement.”¹¹⁰ Courts following this approach look first to determine whether a limited remedy under section 26-1-2-719(2) of the Indiana Code has failed of its essential purpose, and, if so, then any other provision excluding consequential damages is deemed automatically void.¹¹¹

After parsing the logic of both approaches, the *Rheem* court concludes that the majority “independent” approach is more consistent “with Indiana jurisprudence and the purposes of the UCC.”¹¹² In particular, the court noted that sections 2 and 3 of Indiana Code section 26-1-2-719 are tested by different standards: “a limited remedy [is tested] by failure of essential purpose, and an exclusion [is tested] by unconscionability,” and concluded that the two sections of the code “were intended to be read independently of one another.”¹¹³ The *Rheem* court agrees with the reasoning of the United States Court of Appeals for the Third Circuit that the failure of a limited remedy provision in a contract is not alone sufficient to invalidate a separate and distinct term of the contract excluding consequential damages.¹¹⁴

However, the court noted that the cumulative effect of various provisions of a contract may lead to an inequitable result.¹¹⁵ Thus, although the failure of a limited warranty or remedy provision will not automatically invalidate a separate exclusion of consequential damages, the presence of other factors or the

106. See *Rheem Mfg. Co. v. Phelps Heating & Air Conditioning, Inc.*, 714 N.E.2d 1218, 1223 (Ind. Ct. App. 1999), *trans. granted*, No. 49A02-9807-CV-620, 2000 Ind. LEXIS 288 (Ind. Mar. 23, 2000).

107. See *id.*

108. *Id.* at 1223-24.

109. See *id.* at 1224 (citing *Middletown Concrete Prods., Inc. v. Black Clawson Co.*, 802 F. Supp. 1135, 1152 (D. Del. 1992)).

110. *Id.*

111. See *id.*

112. *Id.* at 1227.

113. *Id.*

114. See *id.* (citing *Chatlos Sys., Inc. v. National Cash Register Corp.*, 635 F.2d 1081, 1086 (3d Cir. 1980); *accord* *Smith v. Navistar Int'l Transp. Corp.*, 957 F.2d 1439, 1443 (7th Cir. 1992)).

115. See *id.* at 1228.

cumulative effect of limitations and exclusions in a contract may.¹¹⁶ Beyond the specific facts here, the court offers no guidance as to what other factors or how great a cumulative effect among the contract's provisions will result in invalidating an exclusion of consequential damages.

In *Rheem*, the court also concluded that lack of "perfect vertical privity" between the manufacturer and a remote buyer of the goods does not preclude the extension of the manufacturer's warranties to the remote buyer.¹¹⁷

IV. ARTICLE 2—REASONABLE NOTICE FOR TERMINATION OF CONTRACT

In *Best Distributing Co. v. Seyfert Foods, Inc.*,¹¹⁸ the Indiana Court of Appeals addressed what is a reasonable time for notice of termination of a contract terminable at will and questions concerning the good faith duty to perform a contract governed by the UCC. When a contract contains no specific time for termination of the agreement, Indiana law permits either party to terminate the contract at will.¹¹⁹ There can be no action for breach of a contract that is terminable at will.¹²⁰ However, in contracts for the sale of goods governed by Article 2 of the UCC, the code requires that reasonable notice be given for termination of any contract lacking a specific term or time for termination.¹²¹ Furthermore, any agreement between the parties to dispense with notification is deemed invalid if its operational effect would be unconscionable.¹²² Official Comment 8 to UCC § 2-309(3) suggests that "principles of good faith and sound commercial practice" generally require a reasonable time for the other party to seek a substitute arrangement.¹²³ What is a "reasonable time" depends on the nature of the transaction and factors such as "the nature, purpose circumstances" of the action at issue.¹²⁴

Several previous cases applying Indiana law have held that thirty days was a reasonable time for notice of termination under Indiana Code section 26-1-2-309(3).¹²⁵ In *Best*, the distributor argued that the thirty day notice of termination

116. *See id.*

117. *Id.* at 1231.

118. 714 N.E.2d 1196 (Ind. Ct. App. 1999).

119. *See Monon R.R. v. New York Cent. R. Co.*, 227 N.E.2d 450, 457 (Ind. Ct. App. 1967).

120. *See House of Crane, Inc. v. H. Fendrich, Inc.*, 256 N.E.2d 578, 579 (Ind. Ct. App. 1970).

121. *See* IND. CODE § 26-1-2-309(3) (1998).

122. *See id.*

123. U.C.C. § 2-309(3) cmt. 8 (1977).

124. IND. CODE § 26-1-1-204(2).

125. *See, e.g., Monarch Bev. Co. v. Tyfield Importers, Inc.*, 823 F.2d 1187, 1189 (7th Cir. 1987) (holding in an oral agreement terminable at will, with or without cause, by either party, a letter terminating the agreement "immediately" was unreasonable, but 30-days' notice was deemed reasonable); *Communications Maintenance, Inc. v. Motorola, Inc.*, 761 F.2d 1202, 1209-10 (7th Cir. 1985) (finding a contract requiring 30-day notice of termination was reasonable and not unconscionable); *Rockwell Engineering Co. v. Automatic Timing & Controls, Co.*, 559 F.2d 460, 461 (7th Cir. 1977) (holding that where the written contract between parties which required a 30-

of the distributorship agreement was not reasonable because it had been unable to find a substitute arrangement that was as profitable as the arrangement being terminated.¹²⁶ The court rejected the argument that Best had been given unreasonable notice of the termination and its argument that “a ‘reasonable time’ means an indefinite period of time for Best to find an equally financial lucrative substitute.”¹²⁷ The court concluded that “[b]ecause Best found a substitute agreement, Seyfert’s thirty day notice was reasonable.”¹²⁸ The court also held that under Indiana Code section 26-1-2-309 and section 26-1-2-204(2) Seyfert’s thirty-day notice of termination of the contract with Best was reasonable because it provided Best with adequate time to find a substitute supplier.¹²⁹ The test was not whether Best was able to find a substitute that was at least as lucrative as the contract with Seyfert, but whether Best was able to find a substitute agreement.¹³⁰

V. IMPLIED DUTY OF GOOD FAITH IN CONTRACTS UNDER THE UCC

The Indiana Court of Appeals again addressed the question of whether there is a duty of good faith and fair dealing that can form the basis for an independent action in Indiana. In *Best*, the court held that there is no fiduciary relationship as a matter of law between a distributor and distributee, and reaffirmed the holdings in prior Indiana cases that the existence of a fiduciary or confidential relationship between the parties is a question of fact where one party reposes confidence in the other as a result of inequality in bargaining power, dependence, weakness, or lack of knowledge.¹³¹ “However, when the parties involved are in an arm’s length, contractual arrangement, the requisite fiduciary relationship may not be predicated on such an arrangement.”¹³² The court recognized that the UCC (Indiana Code section 26-1-1-203) “imposes an obligation of good faith in . . . performance or enforcement” of every contractual duty, but noted that the official comment to section 1-203 states that this duty does not support an independent cause of action.¹³³ Failure to act in good faith may constitute a breach of the agreement or make a remedial right or power unavailable, but “does not create a separate duty of fairness and reasonableness which can be independently breached.”¹³⁴

In his separate opinion, Judge Sullivan disagreed and noted that Best had

day notice of termination was terminated, but the parties continued to do business under an oral agreement, a 30-day notice of termination of the oral agreement was reasonable).

126. See *Best Distrib. Co. v. Seyfert Foods, Inc.*, 714 N.E.2d 1196, 1207 (Ind. Ct. App. 1999).

127. *Id.*

128. *Id.* (citing *Monarch*, 823 F.2d at 1190).

129. See *id.*

130. See *id.*

131. See *id.* at 1204.

132. *Id.*

133. *Id.* at 1205.

134. *Id.*

alleged a breach of contract claim against Seyfert.¹³⁵ Judge Sullivan therefore would not have affirmed the entry of partial summary judgment for Seyfert, but would have remanded for trial the factual determination as to whether Seyfert's alleged bad faith conduct was a breach.¹³⁶ As noted in Judge Sullivan's separate opinion, concurring in part and dissenting in part, the majority did not address Best's counterclaim alleging several activities in breach of the duty to act in good faith under Indiana Code section 26-1-1-203 and the "reasonable commercial standards of fair dealing in the trade" under Indiana Code section 26-1-2-104 applicable to merchants such as Seyfert.¹³⁷ The court held "that under the Indiana U.C.C. there is no claim for breach of a duty to deal in good faith independent from a breach of contract."¹³⁸

Indiana Code section 26-1-2-103 defines "good faith" among merchants as "honesty in fact and observance of reasonable commercial standards of fair dealing in the trade." The *Best* court does not discuss this definition. Plaintiffs and counter claimants must take heed to plead a breach of the contract, and to include any allegation of a breach of the duty of good faith under Indiana Code section 26-1-1-203 as a part of a claim of breach of the agreement and not as a separate count or independent claim of breach.¹³⁹

135. See *id.* at 1208 (Sullivan, J., concurring in part and dissenting in part).

136. See *id.*

137. *Id.*

138. *Id.* at 1206.

139. See *id.*

1998-1999 BRINGS NEW DEVELOPMENTS TO INDIANA'S WORKER'S COMPENSATION LAW

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INTRODUCTION

The Worker's Compensation Act (the "Act")¹ strikes a compromise between employees and employers. It provides benefits to an injured worker while, at the same time, protecting the employer from conventional tort liability. The Act, as written, is fairly straightforward; however, it fails to address every contingency that arises under worker's compensation law. Certainly, times change, the courts are continually faced with new and distinct issues necessitating an interpretation of the Act that was first written so many years ago.

Indeed, the 1998–1999 survey period was no different. The courts addressed important issues such as the medical management of a claim, the bad faith statute, personal versus employment risks, evidentiary requirements, and a co-employee's intentional acts. This Article summarizes and comments upon the more significant worker's compensation cases published within this survey period as well as recent legislative changes to the Act.

I. MEDICAL MANAGEMENT OF A CLAIM

Undoubtedly, two of most significant cases in this survey period were *Bloomington Hospital v. Stofko*² and *Memorial Hospital v. Szuba*.³ Both cases addressed key aspects of an employer's obligation to medically manage the employee's worker's compensation claim.

A. *Bloomington Hospital v. Stofko*

Perhaps one of the most important cases decided by the Indiana Court of Appeals during this survey period was *Bloomington Hospital v. Stofko*.⁴ In *Stofko*, the employee contracted Hepatitis C as a result of his employment, and his claim was accepted as compensable.⁵ The parties stipulated to all aspects of the claim except the issue of future medical treatment.⁶ The sole issue before the court of appeals was whether Bloomington Hospital should be required to provide all future medical treatment for Stofko's chronic disease.⁷ Bloomington

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1. IND. CODE §§ 22-3-1-1 to 12 (1998).

2. 705 N.E.2d 515 (Ind. Ct. App.), *aff'd on rehearing*, 709 N.E.2d 1078 (Ind. Ct. App. 1999).

3. 705 N.E.2d 519 (Ind. Ct. App. 1999).

4. *Stofko*, 705 N.E.2d at 515.

5. *See id.* at 516.

6. *See id.*

7. *See id.*

Hospital argued that any application for future medical treatment was subject to Indiana Code sections 22-3-7-17⁸ and 22-3-7-27.⁹ The employer essentially urged the court of appeals to interpret these sections as limiting the period of time for which the board could order an employer to provide future medical services.¹⁰

The court of appeals declined to accept the employer's position. Instead, the court of appeals held that an order of future medical treatment was within the board's jurisdiction as part of the "original" award because the permanent partial impairment ("PPI") rating had not been previously adjudicated.¹¹ While it agreed with the employer that Indiana Code sections 22-3-7-17 and 22-3-7-27 restrict the *modification* of awards, the court noted that no modification was at issue in this case.¹² To the contrary, the employee's application for adjustment of claim

8. Indiana Code § 22-3-7-17(b) provides:

After an employee's occupational disease has been adjudicated by agreement or award on the basis of permanent partial impairment and within the statutory period for review in such case as provided in section 27(i) of this chapter, the employer may continue to furnish a physician or a surgeon and other medical services and supplies, and the board may, within such statutory period for review as provided in section 27(i) of this chapter, on a proper application of either party, require that treatment by such physician or surgeon and such services and supplies be furnished by and on behalf of the employer as the board may deem necessary to limit or reduce the amount and extent of such impairment.

IND. CODE § 22-3-7-17(b) (1998).

9. Indiana Code § 22-3-7-27(1) provides:

The power and jurisdiction of the worker's compensation board over each case shall be continuing, and, from time to time, it may upon its own motion or upon the application of either party on account of a change in condition, make such modification or change in the award ending, lessening, continuing, or extending the payments previously awarded, either by agreement or upon hearing, as it may deem just, subject to the maximum and minimum provided for in this chapter. When compensation which is payable in accordance with an award or settlement contract approved by the board is ordered paid in a lump sum by the board, no review shall be had as in this subsection mentioned. Upon making any such change, the board shall immediately send to each of the parties a copy of the modified award. No such modification shall affect the previous award as to any money paid thereunder. The board shall not make any such modification upon its own motion, nor shall any application therefor be filed by either party after the expiration of two (2) years from the last day for which compensation was paid under the original award made either by agreement or upon hearing, except that applications for increased permanent partial impairment are barred unless filed within one (1) year from the last day for which compensation was paid. The board may at any time correct any clerical error in any finding or award.

IND. CODE § 22-3-7-27(1).

10. See *Stofko*, 705 N.E.2d at 518.

11. *Id.*

12. See *id.*

sought benefits and medical expenses in the form of an "original award."¹³ The court of appeals stated:

in deciding that the Board has jurisdiction as part of an original award of Occupational Disease benefits to order payment of medical expenses for the lifetime of the employee, we are mindful that the Worker's Compensation Act and the Occupational Disease Act are for the benefit of the employee and that the Acts should be liberally construed so as not to negate their humane purposes.¹⁴

The court specifically focused on the fact that Hepatitis C is a continuing condition that would most likely result in deteriorating health and increasing medical expenses over the employee's lifetime and that an employee might not be adequately compensated by accepting a lump sum payment at the onset of the disease.¹⁵

While the Worker's Compensation Act itself does not plainly state that an employer might be required to provide future medical services for an indefinite amount of time, it is certainly clear from reading *Bloomington Hospital* that this potential liability exists. It is, in fact, this potential liability that creates somewhat of a problem when attempting to settle a claim where future medical treatment might be contemplated. Obviously, it is difficult to value the cost of such future treatment and, perhaps more importantly, whether such measures will in actuality be necessary in the long run. Thus, in many cases where settlement is not a viable option, the adjudication of an impairment may not be the end of a claim but, rather, the beginning of long-term medical management.

*B. Memorial Hospital v. Szuba*¹⁶

On December 22, 1993 Michael Szuba sustained head injuries when he slipped and fell in Memorial Hospital's parking lot.¹⁷ The employer, Memorial Hospital, paid Szuba's medical expenses but, because he did not miss more than seven days of work, Szuba did not file for temporary total disability benefits.¹⁸ No permanent partial impairment ("PPI")¹⁹ rating was tendered, presumably due to the fact that injury was slight. Szuba, however, later filed an Application for Adjustment of Claim requesting Memorial Hospital to obtain such a rating.²⁰

13. *Id.*

14. *Id.* at 518-19 (citation omitted).

15. *See id.* at 519.

16. 705 N.E.2d 519 (Ind. Ct. App. 1999).

17. *See id.* at 520.

18. *See id.*

19. PPI benefits are payable after the injury is quiescent and the permanent loss of a physical function has been medically assessed. The PPI rating is a rating by degrees assigned to represent the employee's permanent loss of function. Compensation of that loss is determined by the scheduled rate that corresponds to the given PPI rating. *See* IND. CODE § 22-3-3-10 (1998).

20. *See Szuba*, 705 N.E.2d at 520.

The issue before the Indiana Court of Appeals was whether Memorial Hospital had an obligation to obtain a PPI rating for Szuba's injuries.²¹

Memorial Hospital argued that the Worker's Compensation Act does not assign the responsibility to obtain a rating to any particular party and that because the rating is an "element" of Szuba's application for benefits, he ought to have the burden of proving PPI.²² The court of appeals, however, rejected Memorial Hospital's argument, stating that:

[T]he statute anticipates that the employer will provide care through the determination of PPI. Reading the statute liberally as required by the Act, we find that the initial PPI determination is part of an employee's necessary medical treatment We hold that the burden of producing a PPI rating lies with the employee only where the employee disagrees with the determination provided by the employer's physician.²³

Interestingly, the court of appeals indicated in a footnote that the expense of a subsequent PPI determination obtained by an employee, i.e., a second opinion, must be reimbursed to the employee by the employer if it is ultimately accepted by the Worker's Compensation Board.²⁴

In light of the *Memorial Hospital* opinion, the employer's obligation to medically manage a claim can be understood to include all of the following: the selection of physicians, the preparation of forms, the computation of benefits, the provision of alternative work, and now the determination of PPI. From the employer's perspective, the application of *Memorial Hospital* is somewhat problematic, particularly in a situation where an employer is faced with an injury that is relatively slight in nature and the employee is treated only a few times with minimal lost time from work. The only practical way to meet the employer's obligation is to communicate at the outset with the employee's treating physician and request that as part of the initial and continuing treatment the physician provide his opinion whether a permanent loss of function has occurred. If the physician's opinion in that regard is solicited during the course of the treatment rather than weeks or months later, the expense of a re-examination for the employee for the sole purpose of impairment may be avoided.

From an employee's perspective, if an employer fails to obtain a PPI rating for an injured employee, it raises the question as to whether they might be liable under the bad faith statute.²⁵ Certainly, as an employee's advocate, one would make that argument but, from a practical standpoint, it would likely boil down to whether the failure to obtain a PPI rating was merely an oversight or a blatant disregard of the employer's obligation to obtain such rating.

21. See *id.*

22. See *id.* at 524.

23. *Id.* (citation omitted).

24. See *id.* at 524 n.11.

25. See IND. CODE § 22-3-4-12.1 (1998).

II. THE BAD FAITH PROVISION

During the 1997-98 survey period, the Indiana Legislature enacted Indiana Code section 22-3-4-12.1 that provided the Worker's Compensation Board with exclusive jurisdiction to adjudicate whether an employer, worker's compensation administrator, or a worker's compensation insurance carrier "has acted with a lack of diligence, in bad faith, or has committed an independent tort in adjusting or settling the claim for compensation."²⁶ An employer, worker's compensation administrator, or worker's compensation carrier liable under this provision faces a \$500 to \$20,000 penalty plus attorney's fees and costs.²⁷ Until this year, there were no reported decisions interpreting this statutory provision. In 1999, not only was this provision constitutionally challenged, but the Indiana Court of Appeals addressed the phrases "adjusting or settling" and "independent tort" within the meaning of Indiana Code section 22-3-4-12.1 (hereinafter the "bad faith statute" or the "bad faith provision").

A. *Borgman v. State Farm Insurance, Co.*

In *Borgman v. State Farm Insurance Co.*,²⁸ the court of appeals held that the bad faith statute was constitutional and, further, due to its procedural nature, was applicable to all pending claims, even those claims alleging injuries prior to July 1997—the effective date of the statute.²⁹

Ms. Borgman was employed by Sugar Creek Animal Hospital, and its worker's compensation insurance carrier was State Farm Insurance Company ("State Farm").³⁰ Ms. Borgman was injured on June 24, 1995 when she fell into one of the kennels maintained at her employer's place of business. She suffered injuries to her arm and neck and sought treatment from her family physician on the same day.³¹ State Farm paid for that doctor visit and Ms. Borgman did not seek further medical treatment until February 1996.³²

On February 19, 1996, Ms. Borgman resigned from her employment with Sugar Creek Animal Hospital. She continued, however, to have pain associated with her injury and, therefore, returned to her family physician where she was referred to a neurologist, Dr. Chase.³³ She treated with Dr. Chase in March and April 1996 returning to her family physician in May 1996. After this visit, her employer opined that her condition was not related to the original June 1995

26. IND. CODE § 22-3-4-12.1(a). For a discussion of the enactment of the bad faith provision, see Carol Modesitt Wyatt, *Recent Developments in Worker's Compensation Law*, 32 IND. L. REV. 1137, 1146 (1998).

27. See IND. CODE § 22-3-4-12.1(b).

28. 713 N.E.2d 851 (Ind. Ct. App.), *trans. denied*, 726 N.E.2d 307 (Ind. 1999).

29. See *id.* at 855-56.

30. See *id.* at 853.

31. See *id.*

32. See *id.*

33. See *id.*

work-injury.³⁴ She was then evaluated in June 1996 by Dr. Shay, at the request of State Farm, whose diagnosis revealed damage to Ms. Borgman's neck and advised that surgery was necessary to eliminate the compression of the nerve root.³⁵ State Farm denied her worker's compensation claim on July 29, 1996, and she subsequently filed an Application for Adjustment of Claim on November 21, 1996.³⁶

In November 1997, State Farm sent Ms. Borgman to be evaluated by a different physician and at that time began providing worker's compensation medical benefits to Ms. Borgman. On July 22, 1998 the Borgmans filed a complaint in civil court against State Farm and Sugar Creek Animal Hospital contending that State Farm had wrongfully denied Ms. Borgman's worker's compensation claim for eighteen months.³⁷ They further alleged that State Farm acted in bad faith and in contravention of its duties under the Act in denying her claim for benefits. Ms. Borgman requested damages for pain and suffering, punitive damages, and attorneys fees. Mr. Borgman also asserted a loss of consortium claim.³⁸

State Farm filed a motion to dismiss arguing that the trial court lacked subject matter jurisdiction and that Ms. Borgman's exclusive remedy was before the Worker's Compensation Board.³⁹ Ultimately, the Indiana Court of Appeals agreed.⁴⁰ The court held that the 1997 bad faith statute pre-empted the practice of suing one's employer or worker's compensation administrator or carrier as third party tortfeasor alleging an independent tort or negligent handling of the claim.⁴¹ While the Borgmans argued that the bad faith provision should not be applied retroactively, the court stated that "the statute is procedural and merely sets forth the proper forum for claims alleging lack of diligence, bad faith or independent torts on the part of the employer, their worker's compensation administrator and the insurance carrier."⁴² Thus, the 1997 bad faith statute reaches not only those claims with an injury date of July 1997 forward but also all pending claims regardless of the injury date.⁴³

34. *See id.*

35. *See id.*

36. *See id.*

37. *See id.*

38. *See id.*

39. *See id.*

40. *See id.* at 855.

41. *See id.* Prior to the enactment of the bad faith provision, an action by an employee against his or her employer or worker's compensation administrator or carrier could have been maintained in civil court for an independent tort, fraud, or gross negligence. *See, e.g., Stump v. Commercial Union*, 601 N.E.2d 327 (Ind. 1992); *Vakos v. Travelers, Ins.*, 691 N.E.2d 499 (Ind. Ct. App.), *trans. denied*, 706 N.E.2d 168 (Ind. 1998).

42. *Borgman*, 713 N.E.2d at 855 n.1.

43. *See also Samm v. Great Dane Trailers*, 715 N.E.2d 420, 423 (Ind. Ct. App. 1999) (holding that retroactive application of the bad faith provision was appropriate), *trans. denied*, No. 84A01-9810-CV-381, 2000 Ind. LEXIS 66 (Ind. Jan. 26, 2000).

The court in *Borgman* also addressed the constitutionality of the bad faith provision. Ms. Borgman argued that the bad faith statute violated the Open Courts Clause of the Indiana Constitution, as set forth in article I, section 12,⁴⁴ because it improperly grants the Worker's Compensation Board the authority to consider claims beyond work-related incidents.⁴⁵ The court rejected Ms. Borgman's theory stating that article I, section 12 "does not prevent the legislature from modifying or restricting common law rights and remedies in cases involving injury to person or property."⁴⁶ With respect to the bad faith statute, the court held that the legislature was merely acting to restrict the remedy available for a breach of duty imposed upon the employer or worker's compensation carrier.⁴⁷ The court further noted that "the statute simply designates the proper forum for bringing enumerated claims against the worker's compensation insurance carrier and does not operate to strip the Borgmans of an established right or recourse."⁴⁸

*B. Samm v. Great Dane Trailers*⁴⁹

Since the enactment of the bad faith statute, practitioners have, at least at the single hearing member level, debated what acts might constitute "bad faith," "lack of diligence," and "independent torts" as contemplated by the bad faith provision. In *Samm v. Great Dane Trailers*, the court considered the term "independent tort" within this context.⁵⁰

On March 27, 1997 Samm injured his lower groin area while on the job. He sought treatment with his family physician on March 31, 1997 and was diagnosed with a hernia which would require surgery.⁵¹ Samm requested worker's compensation benefits, and the employer responded by stating that it would have to investigate the matter. On April 3, 1997 Samm was advised by a company representative that the injury was not work-related and that he was being terminated for making a false claim for worker's compensation benefits.⁵² Samm was terminated the following day. Great Dane ultimately refused to pay for Samm's medical expenses and benefits.⁵³ Samm filed a complaint in civil court

44. Article I, section 12 of the Indiana Constitution provides that, "[a]ll courts shall be open; and every person, for injury done to him and his person, property or reputation, shall have remedy by due course of law. Justice shall be administered freely and without purchase; completely without denial; speedily without delay." IND. CONST. art. I, § 12.

45. See *Borgman*, 713 N.E.2d at 855.

46. *Id.* (citing *State v. Rendleman*, 603 N.E.2d 1333, 1337 (Ind. 1992)).

47. See *id.* at 856.

48. *Id.*

49. 715 N.E.2d 420 (Ind. Ct. App. 1999), *trans. denied*, No. 84A01-9810-CV-381, 2000 Ind. LEXIS 66 (Ind. Jan. 26, 2000).

50. *Id.* at 423.

51. See *id.* at 422.

52. See *id.*

53. See *id.*

alleging that Great Dane falsely accused him of the criminal act of fraud constituting libel per se and that his discharge was in retaliation for pursuing his rights under the Indiana Worker's Compensation Act. He sought both compensatory and punitive damages.⁵⁴

Great Dane moved the trial court to dismiss Samm's complaints for essentially the same reason as State Farm did in *Borgman*. On disposition of the case, the court in *Samm*, like in *Borgman*, held that the bad faith provision was retroactive in application.⁵⁵ The court, however, took a somewhat different approach in analyzing Samm's claim. The court undertook a discussion first of whether the legislature intended the phrase "adjusting or settling"⁵⁶ to include an employer's tortious actions occurring after it had denied an employee's request for benefits and, second, whether the legislature intended retaliatory discharge and defamation to constitute "independent torts" within the meaning of the bad faith statute.⁵⁷

In its quest for defining "adjusting and settling," the court concluded in this instance that the denial of benefits constituted the final step of the company's procedure for adjusting and settling a claim.⁵⁸ In other words, it noted that there were no internal appeal procedures and, therefore, as soon as Great Dane told Samm that it was denying the claim, its "adjusting and settling" period was completed.⁵⁹ Implicit in the court's discussion is the presumption that had the same act occurred prior to the "official denial" of benefits that such act would have been said to have occurred during the "adjusting and settling" phase. The court stated, "We cannot say that the legislature intended the 'adjusting and settling' process to include the discharge of the claimant after the employer has finally denied his request for benefits."⁶⁰ Essentially, it can be inferred from *Samm* that an employer or worker's compensation administrator or carrier is subject to liability under the bad faith provision only during that time frame for which an initial decision on compensability is being determined and, also, for that period of time that the claim remains open in the event that compensability is accepted by the employer or insurance carrier.

The more fascinating component of *Samm*, however, was the court's discussion of what constitutes an "independent tort" under the bad faith statute. The court concluded that the legislature did not intend to include as an independent tort a claim of retaliatory discharge, where such claims are based upon an employee's allegation that he or she was discharged for filing or pursuing worker's compensation benefits.⁶¹ Although recognizing that retaliatory discharge sounds in tort rather than contract, the court found that it was not an

54. *See id.*

55. *See id.* at 423.

56. *Id.* at 424.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *See id.* at 425-26.

independent tort as contemplated by the statute.⁶² The court focused primarily on the fact that Indiana is an at-will employment state⁶³ and that, as such, courts have acknowledged only limited exceptions to this doctrine, one of which an exception for employees discharged in retaliation for filing or pursuing worker's compensation benefits.⁶⁴ The court undertook a lengthy discussion of Indiana cases addressing this exception and, finally, concluded that:

The case law reflects a clear, definite policy in this State supporting an employee's right to file a claim for worker's compensation benefits and to be free from coercion or threats of termination in exercising that right. . . . We presume that the legislature was aware of this policy in passing I.C. 22-3-4-12.1 and intended no changes in the interpretation of such policy⁶⁵

As further support for its holding, the court recognized that the bad faith provision allowed only a recovery of \$500 to \$20,000, "depending upon the degree of culpability and the actual damages sustained"⁶⁶ and that, given this statutory limit on the recovery, it would be inconsistent to with the Indiana Supreme Court's conclusion in *Frampton* that a wrongfully discharged employee is entitled to be "fully compensated."⁶⁷ Accordingly, it stated that had the legislature

intended to place matters of retaliatory discharge within the Board's exclusive jurisdiction and thereby eliminate the availability of a comprehensive remedy in a separate civil action, it would have specifically done so in express terms and not by making a generalized reference to intentional torts which, if proven, are compensable only by a limited award.⁶⁸

The court did, however, hold that defamation was, per se, an "independent tort" within the meaning of the bad faith provision.⁶⁹ Nonetheless, the court remanded the case for further analysis as to whether the defamation occurred during the "adjusting and settling" process.⁷⁰ Put simply, the court stated that if Samm's claim was denied because it was not work-related *and* it was fraudulent, then the defamation would seem to have occurred concurrently with the adjusting and settling of a claim so as to bring the action within the jurisdiction of the Worker's Compensation Board.⁷¹ On the other hand, if Samm's claim was

62. See *id.* at 424.

63. See *id.* at 425.

64. See *Frampton v. Central Ind. Gas Co.*, 297 N.E.2d 425 (Ind. 1973).

65. *Samm*, 715 N.E.2d at 426.

66. *Id.* (quoting *Frampton*, 297 N.E.2d at 428).

67. *Id.*

68. *Id.* (footnote omitted).

69. *Id.* at 427.

70. *Id.*

71. See *id.*

denied because it was not work-related, and he was subsequently terminated for fraudulently submitting a claim, then the defamation would seem to have occurred separately and independently from the employer's procedure for adjusting and settling a claim so as to remove it from the jurisdiction of the Worker's Compensation Board.⁷²

III. CHOKING DETERMINED A "PERSONAL RISK"

In *Indiana Michigan Power Co. v. Roush*,⁷³ Ralph Roush had a history of eating his food without chewing and, during his employment, choked on a sandwich that had been made available after the conclusion of a meeting.⁷⁴ Efforts to perform the Heimlich maneuver were unsuccessful and Roush was taken to the hospital. Roush subsequently died as a result of the choking incident, and a worker's compensation claim was brought by his widow.⁷⁵

The Worker's Compensation Board found that the employee's death was compensable; however, the court of appeals reversed their decision.⁷⁶ The court re-iterated the general rule that risks causing injury or death to an employee can be divided into three categories: "(1) risks distinctly associated with the employment; (2) risks personal to the claimant; and (3) 'neutral' risks which have no particular employment or personal character."⁷⁷ Risks falling into the first and third category are covered under the Indiana Worker's Compensation Act but risks falling into the second category are not.⁷⁸ The court of appeals acknowledged that personal activities undertaken at work for the employee's comfort and convenience have been held to be compensable in the past,⁷⁹ but, if an injury occurs there must be some causal connection to the employment.⁸⁰ The court of appeals held that placing large amounts of food into Roush's mouth and attempting to swallow it whole was a personal risk and that "[n]othing about Roush's employment increased his risk of choking or was causally connected to

72. See *id.*

73. 706 N.E.2d 1110 (Ind. Ct. App.), *trans. denied* 726 N.E.2d 309 (Ind. Oct. 21, 1999) (mem.).

74. See *id.*

75. See *id.* at 1112.

76. See *id.*

77. *Id.* at 1114 (quoting *Four Star Fabricators, Inc. v. Barrett*, 638 N.E.2d 792, 794 (Ind. Ct. App. 1994)).

78. See *id.*

79. See *id.* The court cites, as examples, *Vendome Hotel Inc. v. Gibson*, 105 N.E.2d 906, 910 (Ind. Ct. App. 1952) (accident in which employee's fingers were severed when employee reached into employer's icemaker to get ice for personal consumption held arising out of and in the course of employment) and *Prater v. Indiana Briquetting Corp.*, 251 N.E.2d 810, 813 (Ind. 1969) (accident in which employee was killed when struck by a train while employee was traveling to nearby business establish to purchase soft drinks held arising out of and in the course of employment).

80. See *Roush*, 706 N.E.2d at 1115.

it.”⁸¹

IV. NO MEDICAL DOCUMENTATION NECESSARY

It has been a longstanding practice in worker's compensation that an employee provide medical documentation that he or she is unable to perform his or her regular work duties. In a clear departure from this practice, the court of appeals in *Tanglewood Terrace v. Long*⁸² held that an employee can offer lay testimony regarding his or inability to work and that medical documentation of disability is not required in Indiana.

In *Tanglewood*, the injured employee, Sonya Long, alleged two distinct injuries. The first occurred when the employee twisted her body in an effort to answer the telephone while sitting at her desk and the second injury occurred when Ms. Long was pulled down while she was assisting a resident in the Tanglewood nursing home.⁸³ The single hearing member, as well as the full Board, found in favor of Long and awarded temporary total disability benefits, permanent partial impairment, and appropriate medical care.⁸⁴ The pertinent issue on appeal was the hearing member's determination that Long was entitled to temporary total disability benefits given the absence of any medical documentation to support her claim.⁸⁵ The court of appeals noted that, although a practice amongst worker's compensation litigators, there was no Indiana case law or statutory authority mandating that an employee establish an inability to temporarily perform his or her job duties by medical evidence.⁸⁶ It stated, “compensation boards may rely to a considerable extent on their own knowledge and experience in uncomplicated medical matters, and in such cases awards may be upheld without medical testimony or even in defiance of the only medical testimony.”⁸⁷

From a practical standpoint, as an employer, it might be prudent in borderline cases to have an injured employee evaluated by the company doctor, or other physician with regard to the ability to work. While, at first glance, this might appear to place the burden of proof upon the employer, it would seem that if an employee is able to offer lay testimony that the employer might likely need a medical evaluation to dispute his or her claim even though the employee retains no expert.

V. INTENTIONAL ACTS

81. *Id.*

82. 715 N.E.2d 410 (Ind. Ct. App.), *trans. denied*, 726 N.E.2d 316 (Ind. Dec. 28, 1999) (mem.).

83. *See id.* at 413.

84. *See id.* at 412.

85. *See id.* at 413.

86. *See id.* at 414.

87. *Id.* (quoting 7 ARTHUR LARSON & LEX K. LARSON, *THE LAW OF WORKER'S COMPENSATION* § 79, at 15-426.32(66) (1952)).

This survey period, the Indiana Supreme Court, in two companion cases, *Tippmann v. Hensler*⁸⁸ and *Wine-Settergren v. Lamey*,⁸⁹ discussed whether a civil suit could be maintained by an injured employee against a co-employee for his or her alleged "intentional acts."

A. Tippmann v. Hensler

In *Tippmann*, Dennis Tippmann and Brian Hensler were co-employees of Tippmann Pneumatics, Inc. Hensler was employed as a paintball gun assembler while Tippmann worked in the service department repairing paintball guns.⁹⁰ During a scheduled break, Tippmann began "playing around" by aiming a paintball gun at Hensler that Tippmann had just serviced and inquiring, "[w]here do you want me to shoot you at?"⁹¹ Hensler responded by leaving the room and returning with another paintball gun. The two then began conversing and were no longer pointing the paintball guns at each other.⁹²

The other employees in the break room began shooting paintball guns down the length of the room at a designated testing area "just for fun" and, eventually, Hensler joined in this activity.⁹³ Tippmann angrily told the employee to quit firing due to the "mess" left behind by the discharged paint. In defiance, Hensler "dry fired" his gun at the ceiling.⁹⁴ Tippmann then loaded his paintball gun and told Hensler he was going to shoot him. Hensler left the room and after he had left Tippmann fired at the exit door to make a loud sound and "scare" Hensler. Unfortunately, Hensler unexpectedly returned, and, upon re-entering the room, Hensler was struck with the paintball in the left eye causing severe and permanent damage.⁹⁵

Hensler filed a worker's compensation claim against the employer that was ultimately settled by agreement. He then filed a claim in civil court against Tippmann alleging that Tippmann's negligence caused the injury or, in the alternative, that Tippmann intentionally caused the injury.⁹⁶ Tippmann moved for summary judgment arguing that the exclusive remedy provision of the Worker's Compensation Act⁹⁷ barred Hensler's claim.

The trial court denied Tippmann's motion, and, on interlocutory appeal, the court of appeals reviewed the case and remanded for a factual determination of whether Hensler was an active participant in the horseplay.⁹⁸ Before further

88. 716 N.E.2d 372 (Ind. 1999).

89. 716 N.E.2d 381 (Ind. 1999).

90. See *Tippmann*, 716 N.E.2d at 373.

91. *Id.*

92. See *id.*

93. *Id.*

94. *Id.* at 374.

95. See *id.*

96. See *id.*

97. See IND. CODE § 22-3-2-6 (1998).

98. See *Tippmann v. Hensler*, 654 N.E.2d 821, 826 (Ind. Ct. App. 1995), *vacated*, 716

findings could be made, the Indiana Supreme Court granted transfer.

The Act provides an exclusive remedy against an employer for accidental injuries that arise out of and in the course of the injured employee's employment.⁹⁹ This immunity extends to suits against those "in the same employ[ment]" as the injured worker when the injury occurred."¹⁰⁰ Thus, the Indiana Supreme Court noted that Hensler could maintain a civil action against Tippmann if it could be shown that either (1) the injury was not accidental or did not arise out of and in the course of the employment; or (2) that Hensler and Tippmann were not in the "same employment" at the time of the injury.¹⁰¹

The court undertook an analysis of prior Indiana opinions addressing the issue. It began by reviewing *Evans v. Yankeetown Dock Corp.*,¹⁰² wherein the court concluded that an injury "by accident" meant "accidental injury" and not "injury caused by an accident."¹⁰³ Given that interpretation, the Indiana Supreme Court had previously adopted the following test for determining when an accidental injury occurred: whether the sufferer intended or expected that injury would, on a particular occasion, result from what he was doing.¹⁰⁴ Then, in *Baker v. Westinghouse Electric Corp.*,¹⁰⁵ the Indiana Supreme Court modified the test to also consider the employer's intentions and expectations stating, "[b]ecause we believe an injury occurs 'by accident' only when it is intended by neither the employee nor employer, the intentional torts of an employer are necessarily beyond the pale of the act."¹⁰⁶

Tippmann argued that according to *Baker*, his intention was irrelevant as the only intent that mattered was that of the injured employee and the employer.¹⁰⁷ The Indiana Supreme Court rejected Tippmann's argument and, instead, extended the *Baker* rule to encompass co-employees.¹⁰⁸ The proper inquiry, stated the court, was "[d]id the party who is advocating the applicability of the Act intend for harm to result from the actions that party undertook?" If so, then the injury did not occur 'by accident' for that particular litigant."¹⁰⁹ Applying this test to the particular facts at hand, the Indiana Supreme Court held that Tippmann had the intent to cause injury to Hensler and, therefore, the injuries were not "by accident."¹¹⁰

Tippmann definitely broadens the area of a civil litigation against co-

N.E.2d 372 (Ind. Sept. 22, 1999).

99. See IND. CODE § 22-3-2-6.

100. *Tippmann*, 716 N.E.2d at 375 (quoting IND. CODE § 22-3-2-6).

101. *Id.* (citations omitted).

102. 491 N.E.2d 969 (Ind. 1986).

103. *Tippmann*, 716 N.E.2d at 375 (citing *Evans*, 491 N.E.2d at 974).

104. See *id.*

105. 637 N.E.2d 1271 (Ind. 1994).

106. *Id.* at 1273.

107. See *Tippmann*, 716 N.E.2d at 375.

108. See *id.* at 376.

109. *Id.*

110. *Id.* at 381.

employees. While *Tippmann* purports to set forth rules for determining third-party tortfeasor liability, it also leaves much room for subjective interpretation of the facts. This decision, however, standing alone would not appear contrary to the intent of the Act to hold tortfeasors liable for their actions while still insulating employers behind the exclusive remedy provisions of the Act.

*B. Wine-Settergren v. Lamey*¹¹¹

Robert Lamey and his co-employee, Cindy Wine-Settergren, were both working for a radio station.¹¹² Lamey worked as sports director and Wine-Settergren as a morning radio personality and news director. Wine-Settergren had recently returned to work following nose surgery and, as a consequence, her nose was particularly sensitive.¹¹³ During a break, Lamey shouted loudly down the hall and, as a result, startled Wine-Settergren who exclaimed, "Oh, my God, Bob." Lamey, apologized for startling her and embraced her in a strong hug. As he hugged her, he pulled her head into his collarbone re-injuring her nose.¹¹⁴ Wine-Settergren never filed a worker's compensation claim but, instead, filed a civil suit seeking permanent pain and suffering, loss of her senses of taste and smell, the need for cosmetic surgeries and lost wages associated with the surgeries. Lamey moved the court for a dismissal and, accordingly, the trial court dismissed the suit holding that the exclusivity provision of the Act precluded Wine-Settergren civil suit.

Applying the test enumerated in *Tippmann*, the Indiana Supreme Court concluded that Wine-Settergren's injuries were not intentionally caused and, therefore, went on to consider whether Lamey and Wine-Settergren were in the "same employment."¹¹⁵ The Indiana Supreme Court noted that there were two lines of court of appeals cases discussing this concept.¹¹⁶ The first line of cases, most notably, *Martin v. Powell*¹¹⁷ and *Seiler v. Grow*,¹¹⁸ focus upon "whether the accidental injury arose 'in the course of [the tortfeasor employee's] employment.'"¹¹⁹ Thus, under this line of cases, application of the phrase "in the same employ[ment]" includes an analysis of the co-employee's injury causing actions to determine whether they were causally related to his employment.¹²⁰ Under this approach, non-job related action, for example, horseplay or sexual harassment, have been determined not to have a causal connection to the co-

111. 716 N.E.2d 381 (Ind. 1999).

112. *See id.* at 383.

113. *See id.*

114. *See id.*

115. *Id.* at 384.

116. *See id.*

117. 477 N.E.2d 943 (Ind. Ct. App. 1985).

118. 507 N.E.2d 628 (Ind. Ct. App. 1987).

119. *Lamey*, 716 N.E.2d at 384 (quoting *Seiler*, 507 N.E.2d at 631; *Martin*, 477 N.E.2d at 945)).

120. *Id.* at 385.

employee's employment, thus, rendering the co-employee "not in the same employ[ment]" and vulnerable to civil suit.¹²¹

The other line of cases, exemplified best by *Weldy v. Kline*,¹²² disapproved with the analysis in *Martin* and *Seiler* and, instead, stated that the court should not concern itself with action of the co-employee but, rather, the co-employee is in the same employment if he "could obtain compensation benefits [under] the same or similar circumstances" as the injured employee.¹²³ The *Weldy* test essentially asks whether the defendant, had he received rather than caused the injury, would have been able to recover similar benefits from the plaintiff's employer.¹²⁴

The Indiana Supreme Court rejected the position taken in *Weldy* stating, "we cannot think of an instance where the defendant would be subject to [civil] suit under this test if he and the plaintiff were also co-employees."¹²⁵ In a thoughtful opinion considering precedent, legislative intent, and policy concerns, the court affirmed its "prior approval of the *Martin* standard for use in determining when a co-employee tortfeasor is 'in the same employ[ment].'"¹²⁶

In determining whether Lamey's actions were in the course of employment, the court noted that "in the course of the employment" refers to the time, place, and circumstances under which the accident occurs.¹²⁷ Certainly, the injury occurred during working hours in a vending machine area located upon the employer's premises and, thus, the first two prongs were clearly satisfied.¹²⁸ With respect to the "circumstances" under which the accident occurred, the Indiana Supreme Court reasoned that maintaining a congenial work environment where employees get along with each other is desired by both employees and employers and that Lamey's embracing hug and consolation of Wine-Settergren was an action reasonably expected between employees.¹²⁹ Accordingly, Lamey's actions were concluded to be in the course of his employment, thus preventing Wine-Settergren's civil action.¹³⁰

What the supreme court does not answer, however, is: When does congenial behavior cross the line into something more? When does a concerned hug become sexual harassment? How does an employer advise a supervisor who is too "warm and fuzzy"? These are the types of questions that will no doubt be raised in future litigation.

121. *Id.*

122. 616 N.E.2d 398 (Ind. Ct. App. 1993).

123. *Lamey*, 716 N.E.2d at 385 (quoting *Weldy*, 616 N.E.2d at 403).

124. *See id.*

125. *Id.*

126. *Id.* at 386.

127. *Id.* at 390 (citations omitted).

128. *See id.*

129. *See id.*

130. *See id.*

VI. LEGISLATIVE AMENDMENTS

Finally, the Indiana General Assembly passed a few notable amendments to the existing Worker's Compensation Act including: mandatory electronic reporting, school to work students, doubling of PPI for some partial amputations, and changes to the second injury fund.

A. Mandatory Electronic Reporting

Indiana Code section 22-3-4-13 was amended to require that all insurance carriers, self-insurers, and third party administrators responsible for submitting a First Report of Injury do so using electronic data interchange standards prescribed by the Board.¹³¹ Previously, it was permissible to submit such reports via United States mail, however, this amendment mandates compliance with the electronic format by June 30, 1999.¹³² If an entity cannot comply with the electronic filing rule by the June 30, 1999 deadline, then an implementation plan must be approved by the Board no later than June 30, 2000, which provides for electronic reporting of the First Reports of Injury no later than December 31, 2000.¹³³

B. School to Work Students

A student participating in on-the-job-training under the federal School to Work Opportunities Act¹³⁴ will be known as a "school to work student" and, to the extent he or she suffers an otherwise compensable injury, he or she will be entitled to medical benefits, PPI benefits, death benefits in a lump sum of \$175,000, and burial expenses.¹³⁵ A school to work student is not entitled to temporary total disability benefits or temporary partial disability benefits.¹³⁶ Further, should the school to work student seek to modify the award under Indiana Code section 22-3-3-27, the school to work student's average weekly wage is presumed to be equal to the federal minimum wage.¹³⁷

C. Partial Amputations

The Indiana Worker's Compensation Act provides scheduled impairments for certain losses, for example, total and partial amputations.¹³⁸ For injuries occurring after July 1, 1999, a PPI rating associated with the partial amputation of the fingers or toes, enucleation of an eye, or loss of a testicle shall be

131. See IND. CODE § 22-3-4-13(b)(1) (1998).

132. See *id.*

133. See *id.* § 22-3-4-13(b)(2).

134. See 20 U.S.C. §§ 6101-6104 (1994).

135. IND. CODE §§ 22-3-2-2.5, 22-3-7-2.5.

136. See *id.* § 22-3-2-2.5(d)(1)-(2).

137. See *id.* § 22-3-2-2.5(c).

138. See generally *id.* § 22-3-3-10.

doubled.¹³⁹ This has been the case with total amputations since 1997, thus, this provision merely enhances the recovery available for partial amputations.

D. Second Injury Fund

The Worker's Compensation Board is now required to enter into a contract with an actuary or other qualified firm in order to calculate a recommended funding level for the second injury fund.¹⁴⁰ If the fund has a credit balance of less than \$1 million as of October 1 of any given year, then the Board must notify insurance carriers, other entities or self-insurers by October 1 that an assessment is necessary.¹⁴¹ The assessment may not exceed 1.5% of temporary total disability, temporary partial disability, permanent partial impairment, permanent total disability and death benefits paid in the calendar year preceding the assessment due date and must be paid within thirty days of the assessment notice.¹⁴² For insured employers, the assessment must be collected through a surcharge based upon the employer's premium and must be shown as a separate amount on the premium statement.¹⁴³

CONCLUSION

As stated previously, the Worker's Compensation Act forms a compromise between employees and employers by providing benefits to an injured worker while, at the same time, protecting the employer from conventional tort liability. Certainly, as the times change, the courts will continue to be faced with new and distinct issues necessitating an interpretation of the Act. Several important opinions have been decided during the current survey year and practitioners look forward with interest to what the next survey period will bring.

139. *See id.* § 22-3-3-10(c)(2).

140. *See id.* § 22-3-3-13.

141. *See id.* § 22-3-3-13(c)(2).

142. *See id.*

143. *See id.* § 22-3-3-13(e).

ARTICLE

BEYOND DEAD RECKONING: MEASURES OF MEDICAL INJURY BURDEN, MALPRACTICE LITIGATION, AND ALTERNATIVE COMPENSATION MODELS FROM UTAH AND COLORADO

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INTRODUCTION

In the three decades since Guido Calabresi's landmark study of accidents,¹ interest in the empirical examination of tort law has flourished. Torts, unlike many branches of law, is particularly amenable to quantitative analysis. Torts usually involve discrete, identifiable events that feed into large, accessible repositories of information. Jury verdict reports, administrative data from liability insurers, and measures of injury rates across specific sectors all provide rich opportunities for measurement. Researchers from diverse disciplinary backgrounds—including law, economics, statistics, management, public health, psychology, operations research, and political science—have taken advantage of these data sources, and have begun to sketch a fairly detailed picture of the relationship between injuries, claims, compensation, and behavioral responses

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1. See GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970).

to litigation.²

Three approaches to the empirical study of torts predominate. The first approach is concerned with the consequences of litigation. How do the type, volume, and, severity³ of litigation affect the behavior of individuals, organizations and markets? The deterrence function of tort law is often examined within this framework; for example, in studies that measure the effect of litigation on (would-be) tortfeasors' safety practices.⁴ Other studies in this category test the impact of accident litigation on prices of and demand for services in particular sectors,⁵ workers' wages, and the financial stability of firms.⁶

A second approach, probably the one most widely pursued in empirical analyses of tort law, focuses on the performance of the tort system in a narrower sense. It involves measurement of outcomes directly related to the litigation process.⁷ Commonly used measures include the speed and consistency of resolution, differential success rates among litigants, jury decision-making, and the impact of litigant characteristics, such as the defendant's wealth, on the outcomes of cases.⁸ The defining feature of the observations that form the basis

2. See generally STEPHEN J. CARROLL ET AL., NO-FAULT APPROACHES TO COMPENSATING PEOPLE INJURED IN AUTOMOBILE ACCIDENTS (1991); PATRICIA M. DANZON, MEDICAL MALPRACTICE: THEORY, EVIDENCE, AND PUBLIC POLICY (1985); DON DEWEES ET AL., EXPLORING THE DOMAIN OF ACCIDENT LAW: TAKING THE FACT SERIOUSLY (1996); JAMES K. HAMMITT & JOHN E. ROLPH, LIMITING LIABILITY FOR AUTOMOBILE ACCIDENTS: ARE NO-FAULT TORT THRESHOLDS EFFECTIVE? (1985); DEBORAH R. HENSLER ET AL., COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES (1991); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—and Why Not?*, 140 U. PA. L. REV. 1147 (1992).

3. "Severity," as it is used here, refers to the dollar magnitude of payments in claims where the plaintiff obtains such payments, whether by settlement or court judgment.

4. See, e.g., DEWEES ET AL., *supra* note 2; MICHAEL J. MOORE & W. KIP VISCUSI, COMPENSATION MECHANISMS FOR JOB RISKS: WAGES, WORKERS' COMPENSATION AND PRODUCT LIABILITY (1990); Henry W. Herzog & Alan M. Schlotman, *Valuing Risks in the Workplace: Market Price, Willingness to Pay, and the Optimal Provision of Safety*, 72 REV. ECON. & STATISTICS 463 (1990); W. Kip Viscusi, *Liability for Occupational Accidents and Illnesses*, in LIABILITY: PERSPECTIVES AND POLICY (Robert Litan & Clifford Winston eds., 1988).

5. See, e.g., STEVEN GARBER, PRODUCT LIABILITY AND THE ECONOMICS OF PHARMACEUTICALS AND MEDICAL DEVICES (1993).

6. See, e.g., *id.*; JAMES S. KAKALIK ET AL., COSTS OF ASBESTOS LITIGATION (1983); W. KIP VISCUSI, FATAL TRADEOFFS: PUBLIC AND PRIVATE RESPONSIBILITIES FOR RISK (1992).

7. The litigation process should be interpreted broadly here to include alternatives to litigation, such as arbitration and mediation, along with standard conduits to litigation such as liability insurance companies.

8. For examples of studies in each of these areas, see Randall R. Bovbjerg et al., *Administrative Performance of No-Fault Compensation for Medical Injury*, 60 LAW & CONTEMP. PROBS. 1 (differential success rates); Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering"*, 83 NW. U. L. REV. 908 (1989) (consistency); James S. Kakalik, *Just "Speedy" and Inexpensive?*; *Judicial Case Management Under the Civil Justice Reform Act*,

of performance, or process-related, analyses of tort law is entry into the system; thus, the relevant data surface contingent upon the filing of a lawsuit, or when a claim is made to a private body, such as a commercial insurer, or to a public one, such as a workers' compensation agency.

A third approach addresses the relationship between the underlying rates of actionable (or potentially actionable) harms, on the one hand, and claim filing behavior and litigation, on the other. Because the harms are not necessarily earmarked by entry into the legal system, no tidy store of data points exists. Rather, investigators must use population-based methods⁹ to detect the "incidence" and "prevalence" of injuries at their source—locations such as highways, hospitals, the home, and the workplace.¹⁰ In pursuing these methods, investigators tend to borrow heavily from primary data collection techniques developed in other disciplines, particularly epidemiology and empirical economics.

The infrequency of most injuries in the general population means that large study samples must be drawn, which quickly drives up data and labor requirements, and with them, the price tag for research projects. But population-based studies remain the only way in which a complete picture of access to and use of the legal system can be assembled; they are unique in their ability to evaluate the compensation and deterrence functions of tort law by taking account of its full audience—actual, as well as prospective, users. The two leading examples of such studies, to date, have employed different data collection strategies. Deborah Hensler and her colleagues studied accidental injuries in the United States by surveying nearly 26,000 households.¹¹ The Harvard Medical

80 JUDICATURE 184 (1997) (speed and consistency); Robert MacCoun, *Inside the Black Box: What Empirical Research Tells Us About Decisionmaking by Civil Juries*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 137, 155-56 (Robert E. Litan ed., 1993) (jury decision-making); Frank A. Sloan & Chee Ruey Hsieh, *Variability in Medical Malpractice Payments: Is the Compensation Fair?*, 24 LAW & SOCIETY REV. 997 (1990) (consistency); Neil Vidmar, *Empirical Evidence on the Deep Pockets Hypothesis: Jury Awards for Pain and Suffering in Medical Malpractice Cases*, 43 DUKE L.J. 217 (1993) (litigant characteristics).

9. "Population-based" methods are concerned with investigation of the frequency, distribution and determinants of specific events (e.g., an injury, claim, or verdict) as they occur in the real world. Generally, population-based studies proceed by drawing a sample from a larger population, usually in a random manner, investigating the events of interest in the sample, and then drawing inferences about the population from the findings. These methods are central to the field of epidemiology—the study of disease patterns in communities—where population-based analysis, relying heavily on the mathematical theory of probability, has developed steadily since the mid-Nineteenth Century. See CHARLES H. HENNEKENS & JULIE E. BURING, *EPIDEMIOLOGY IN MEDICINE* 3-13 (1987).

10. As these terms are used in epidemiology, "prevalence" refers to the proportion of individuals in a population who have the disease of interest at a given point in time. "Incidence" refers to the number of new events or cases of the disease that develop in a population of individuals during a specified time interval. See *id.* at 57.

11. See HENSLER ET AL., *supra* note 2, at 13.

Practice Study searched medical records for documented evidence of iatrogenic injury, reviewing information on more than 30,000 episodes of care.¹²

A significant portion of the empirical analysis of tort law reported to date has centered on the medical malpractice system. A review of the malpractice literature reveals numerous examples of each of the three investigational approaches outlined above.¹³ For example, one recent study of malpractice liability reforms tested the effect if laws that had narrowed physicians' exposure to suit, finding that such laws appeared to reduce hospital expenditures without increasing mortality.¹⁴ Analyses of insurance company records have found that compensation reasonably follows negligent injury,¹⁵ while several studies of courtroom verdicts have suggested that juries make reasonable assessments of damages in malpractice litigation, even agreeing with independent expert assessments.¹⁶

Reasons for the focus on medical malpractice are not difficult to find. First, it accounts for an appreciable share of the tort litigation: excluding automobile accident litigation, medical malpractice accounts for approximately thirteen percent of the tort caseload and eighteen percent of cases that proceed to trial.¹⁷ Second, public and political unrest about malpractice spiraled along with claims rates in the mid-1980s,¹⁸ raising its profile as a public policy issue and rousing the interest of research funding agencies. Third, and perhaps most significantly, quantitative research into medical malpractice appears to have ridden a wave of enthusiasm generated by scholars from two major empirical movements of the last decade—health services research and “law and economics”—converging, and stumbling upon an area of mutual interest. Justifiably, both camps claim important perspectives.

Despite an outpouring of malpractice analyses, the Harvard Medical Practice Study (“HMPS”), completed in 1991, stands as the sole population-based study

12. See Howard H. Hiatt et al., *A Study of Medical Injury and Medical Malpractice*, 321 NEW ENG. J. MED. 480, 481-82 (1989); see also Troyen A. Brennan et al., *Incidence of Adverse Events and Negligence in Hospitalized Patients: Results of the Harvard Medical Practices Study I*, 324 NEW ENG. J. MED. 370, 370 (1991).

13. For overviews of empirical work in medical malpractice, see DEWEESE ET AL., *supra* note 2, at 95-187; FRANK A. SLOAN ET AL., *SUING FOR MEDICAL MALPRACTICE* (1993); PAUL C. WEILER, *MEDICAL MALPRACTICE ON TRIAL* (1991).

14. See Daniel Kessler & Mark McClellan, *Do Doctors Practice Defensive Medicine?*, 111 Q.J. ECON. 353, 386 (1996).

15. See Henry S. Farber & Michelle J. White, *A Comparison of Formal and Informal Dispute Resolution in Medical Malpractice*, 23 J. LEGAL STUD. 777, 778 (1994); Mark I. Taragin et al., *The Influence of Standard of Care and Severity of Injury on the Resolution of Medical Malpractice Claims*, 117 ANNALS INTERNAL MED. 780, 783-84 (1992).

16. See, e.g., Thomas B. Metzloff et al., *Empirical Perspectives on Mediation and Malpractice*, 60 LAW & CONTEMP. PROBS. 107, 116 (1997).

17. See CAROL J. DE FRANCES ET AL., U.S. DEP'T OF JUSTICE, CIVIL JUSTICE SURVEY OF STATE COURTS, 1992: CIVIL JURY CASES AND VERDICTS IN LARGE COUNTIES 2 (1995).

18. See WEILER, *supra* note 13, at 2-5.

in this area.¹⁹ No doubt the principal explanation is cost. Because of the sample size demands and the need to obtain specific information on each injury and claim, the resource requirements for population-based studies are generally prohibitive.²⁰

From 1995 to 1998, we had the opportunity to conduct a research project in Utah and Colorado designed to test the HMPS results in a new environment. This Article overviews the results of those studies and explores some policy implications. Part I recaps the intellectual and methodological heritage of our study. Part II describes important changes in the health care system and peculiarities of the New York study that made repetition of a large-scale study of iatrogenic injury worthwhile. Part III gives a brief account of the origins of our study. Part IV outlines each of the four main areas of analysis that comprised the Utah-Colorado Medical Practice Study ("UCMPS"): incidence of medical injury; malpractice claiming behavior; the economic consequences of medical injury; and the feasibility of alternative approaches to compensation. We also describe key results from analyses in each of these areas. The final Part summarizes our findings, and discusses their implications for health care policy.

I. A SHORT HISTORY OF POPULATION-BASED STUDIES OF MALPRACTICE

Perhaps the most significant contribution from malpractice research to a general understanding of tort law comes from a series of studies of iatrogenic injury,²¹ its economic consequences, and the resolution of associated claims. The pioneering work was undertaken in California in the late 1970s and early 1980s. Responding to a perceived crisis in malpractice litigation in the mid-1970s, the California Medical Association and the California Hospital Association jointly commissioned a study of medical records to measure rates of injury in hospitalized patients. A team of medico-legal experts, led by Don Harper Mills, reviewed nearly 21,000 records in twenty-three hospitals across the state and found 970 incidents of disability caused by health care management.²² Because the hospitals were carefully selected to be representative of hospitals statewide in terms of size, ownership, teaching status, and region, the findings of the Medical Insurance Feasibility Study ("MIFS") implied that approximately 4.6%, or roughly one in twenty Californians hospitalized in the mid-1970s suffered some sort of iatrogenic injury.²³ One in every one hundred inpatients suffered an

19. See Randall R. Bovbjerg & Frank A. Sloan, *No-Fault for Medical Injury: Theory and Evidence*, 67 UNIV. CIN. L. REV. 53, at 56 n.11 (1998).

20. In year 2000 dollars, the total cost of the Harvard Medical Practice Study was approximately \$4.7 million.

21. Iatrogenic injuries are those caused by the diagnosis or manner of treatment by the physician.

22. CAL. MED. ASS'N & CAL. HOSP. ASS'N, REPORT ON THE MEDICAL INSURANCE FEASIBILITY STUDY (Don H. Mills ed., 1977); see also Donald Harper Mills, *Medical Insurance Feasibility Study—A Technical Summary*, 128 WESTERN J. MED. 360 (1978).

23. See Mills, *supra* note 22.

injury that gave rise to permanent or grave disability.²⁴

These findings were somewhat at odds with the *zeitgeist*. After creeping steadily upward for fifteen years, the frequency of claims against physicians, the size of payments made to plaintiffs, and (consequently) malpractice insurance premiums all rose dramatically through the period 1973 through 1976.²⁵ Resentment of lawsuits, and the "cowboy" lawyers that brought them, was running high, especially among members of the medical profession.²⁶ Thus, MIFS presented an ticklish scenario: injury rates dwarfed claims rates, increases in litigation notwithstanding. But a formal injury-claims comparison was not made. The sponsors of the study shelved it. Aside from a brief technical summary,²⁷ the findings were published only as an in-house document.

In the early 1980s, the so-called malpractice "crisis" had largely subsided, with claims rates nationwide returning to manageable if not quite pre-crisis levels,²⁸ when a RAND economist, Patricia Danzon, picked up the results of MIFS and took the important step of actually comparing the frequency of injury to the litigation rates. Relying on aggregate claims data collected by the National Association of Insurance Commissioners in surveys of private insurers, Danzon estimated that hospital injuries did indeed exceed malpractice claims and, strikingly, they did so by a factor of ten to one.²⁹ Because she was unable to link the injury data collected in MIFS with claims data at the individual patient/plaintiff level, however, it was not possible to measure the extent of overlap between the two populations.

In the midst of a second surge in malpractice claims in the mid-1980s, a group of investigators led by Dr. Howard Hiatt, the former Dean of the Harvard School of Public Health, resolved to undertake a comprehensive evaluation of malpractice litigation in a single state.³⁰ The objective was to answer three questions: 1) How frequently do medical injuries occur in hospitals, particularly the subset of injuries attributable to negligent care? 2) What portion of those injuries give rise to litigation and, conversely, how much litigation proceeds in the absence of such injuries? and 3) what are the economic consequences of medical injuries? The Harvard investigators soon recognized that answering these questions would require a costly and labor intensive study, involving review of medical records, access to malpractice claims files, and interviews with patients.

24. See *id.*

25. See DANZON, *supra* note 2, at 58-65; WEILER, *supra* note 13, at 5, 8;

26. Frank P. Grad, *Medical Malpractice and the Crisis of Insurance Availability: The Waning Options*, 36 CASE W. RES. 1058, 1058-59 (1986); David J. Nye et al., *The Causes of the Medical Malpractice Crisis: An Analysis of Claims*, 76 GEO. L.J. 1495, 1495-98 (1988).

27. See Mills, *supra* note 22.

28. DANZON, *supra* note 2; WEILER, *supra* note 13.

29. See DANZON, *supra* note 2, at 24.

30. For a fuller description of the origins of the study and the team of investigators involved, see the preface of HARVARD MEDICAL PRACTICE STUDY, PATIENTS, DOCTORS, AND LAWYERS: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION IN NEW YORK (1990).

Dr. Hiatt secured a significant funding commitment from the New York Department of Health and from the Robert Wood Johnson Foundation to undertake the study.³¹ After three years of design work, the investigators commenced data collection in New York. They assembled a representative sample of fifty-two hospitals from among the more than 300 acute care hospitals in New York, and randomly sampled medical records from those hospitals.³² The study sample was "weighted," that is, specially designed to allow statistical transformation of results from this selection of institutions and records into statewide estimates. Teams of physicians and nurses then reviewed each record, looking for evidence of "adverse events"—defined as injuries caused by medical practice, as opposed to a disease process, which either prolonged the patient's hospital stay or resulted in disability at the time of discharge.³³ When an adverse event was detected, the chart review protocol directed the physician reviewers to judge whether it had been caused by negligence.³⁴ Negligence was defined, in accordance with standard tort criteria, as actual injuries proximately resulting from a treating physician's failure to meet the standard of care expected in his practice community.³⁵

While record review proceeded, the investigators contacted more than twenty insurance companies underwriting malpractice risk in New York for injury year 1984.³⁶ Unfortunately, by the time this process began in 1990, the effects of a second tort crisis in the mid-1980s had been felt. Many insurers had gone into state receivership, having failed as a result of unanticipated increases in expenditures on litigation and settlements.³⁷ This made the task of identifying claims quite arduous. Nonetheless, investigators successfully created a database of nearly 68,000 malpractice claims filed between 1974 and 1989.³⁸

Patients were then linked to claimants using software programs designed to maximize the possibility of identifying matches between individuals.³⁹ The matching algorithms allowed for errors and differences in name spelling, then tested the veracity of candidate matches by referring to the descriptive

31. See *supra* note 20.

32. For a full description of the HMPS sampling methodology, see *supra* note 30.

33. More than 200 reviewers were employed in the chart review process.

34. Physician reviewers separately registered their confidence in both the causation and the standard of care components of negligence on a six-point scale: 1, little or no evidence medical management caused the event; 2, slight evidence; 3, not quite likely (less than 50:50 but a close call); 4, more likely than not (greater than 50:50 but a close call); 5, strong evidence; and 6, virtually certain evidence. The threshold for both determinations was a confidence score of four or greater.

35. See W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 30, at 164-65 (5th ed. 1984).

36. See HARVARD MEDICAL PRACTICE STUDY, *supra* note 30, at 7-10 to 7-24.

37. See PAUL C. WEILER ET AL., A MEASURE OF MALPRACTICE: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION 64-65 (1993).

38. See *id.*

39. See HARVARD MEDICAL PRACTICE STUDY, *supra* note 30, at 7-24 to 7-27.

information in the patient and claimant databases. In this way, investigators were able to identify which patients, from those whose medical records were examined in the chart review, were involved in litigation.

Finally, a survey of individuals who had suffered adverse events was conducted to gather information on the economic consequences of the injuries.⁴⁰ This survey occurred more than four years after the injury itself to allow a reasonable assessment of the repercussions of the injury to be made. But unfortunately the respondents' ability to recall actual costs appeared to be significantly impaired by the time elapsed. The site team applied unit cost estimates to information obtained in the surveys to assess overall costs of injury.⁴¹

The results of the HMPS have been widely reported.⁴² The investigators detected a slightly lower rate of adverse events than had been found in MIFS. Approximately 3.7% of patients hospitalized in New York in 1984 were estimated to have suffered a medical injury associated with their stay.⁴³ Just over one quarter of those injuries was due to negligence. Relatively benign-sounding percentages in epidemiological analysis often create shock value when "up-weighted" to total numbers of injuries, an extrapolation that was not possible in the MIFS because of its non-representative sampling design. In the HMPS, however, investigators were able to estimate that approximately 100,000 New Yorkers suffered medical injuries in 1984, 13,000 of which resulted in death.⁴⁴ Negligence gave rise to approximately 20,000 disabling injuries and 7000 deaths.⁴⁵

These alarming statistics have become the chief legacy of the HMPS. For the first time, the burden of morbidity and mortality from medical injuries was widely publicized.⁴⁶ This attention, in turn, helped to spawn interest in error measurement and prevention—one of the most vibrant fields of inquiry in health services research today.⁴⁷ Efforts to understand medical error, however, remain largely contained within a frame of analysis concerned with improving quality of clinical care. Commentators and researchers involved in the study of error—many of them clinicians—typically view the law's role with disdain and

40. See WEILER ET AL., *supra* note 37, at 117-31.

41. See William G. Johnson et al., *The Economic Consequences of Medical Injuries*, 267 JAMA 2487 (1992).

42. For a summary of published articles from HMPS through 1993, see WEILER ET AL., *supra* note 37, at 155-75.

43. See Brennan et al., *supra* note 12, at 370.

44. See *id.*

45. See *id.*

46. See, e.g., *Errors by Doctors in Hospitals Tracked Drug Problems, Wound Infections Cited*, Chi. Trib., Feb. 7, 1991, at C3; *New Study of Hospitals Finds Inadequate Care*, SAN FRAN. CHRON., Feb. 7, 1991, at A2; *New York Study Shows Poor Care in Hospitals Is Leading to Injuries*, N.Y. TIMES, Feb. 7, 1991, at B4.

47. See, e.g., Lucian L. Leape, *Error in Medicine*, 272 JAMA 1851 (1994); Lucian L. Leape et al., *Promoting Patient Safety by Preventing Medical Error*, 280 JAMA 1444 (1998).

pay it little attention. Few have explored legal means for deterring accidents.⁴⁸

The patient safety movement's orientation away from scrutiny of the legal system is problematic, given the solid evidence from HMPS that the tort system was failing in both its compensation and deterrence functions.⁴⁹ In total, approximately 3600 malpractice claims relating to injury year 1984 were made in New York.⁵⁰ A comparison to the 27,000 negligent adverse events arising in that year produces a negligence-to-claims ratio of 7.5—not much smaller than the gap identified by Danzon a decade earlier. Even when the injury sample is narrowed to a subset of more “valuable” tort claims—those involving serious injury to patients less than seventy years old—a ratio of five to two persists.⁵¹

But HMPS analysis of litigation analysis went a step further by matching specific claims to specific injuries. This exercise shed new light on the dimensions of the disconnection between claims and injuries: not only did few documented instances of negligent injury give rise to claims, the majority of claims that were initiated did not appear to be grounded in identifiable instances of negligence. Investigators estimated that, among the 3600 claims in New York relating to injury suffered in 1984, more than one-half arose from instances in which there was neither negligence nor any identifiable injury and one-third arose from instances of injury but no negligence; only one-sixth responded to “true” negligent incidents.⁵² We have previously described this paradoxical relationship as simultaneously lopsided and mismatched.⁵³ Paul Weiler draws an analogy to a traffic officer ticketing random drivers who are not violating traffic laws while allowing many violators to pass.⁵⁴ That many patients who suffer medical injury go uncompensated by tort litigation was not an altogether surprising finding; “under-claiming” in liability insurance programs had been well recognized in other areas.⁵⁵ The prevalence of over-claiming, however, was new information, as was the insight that claims were largely settled on the basis

48. See, e.g., Bryan A. Liang, *Error in Medicine: Legal Impediments to U.S. Reform*, 24 J. HEALTH POL. POL'Y & L. 27 (1999).

49. See WEILER ET AL., *supra* note 37, at 77-134.

50. See A. Russell Localio et al., *Relation Between Malpractice Claims and Adverse Events to Negligence: Results of the Harvard Medical Practice Study III 1991*, 325 NEW ENG. J. MED. 245, 248 (1991).

51. WEILER ET AL., *supra* note 37, at 71.

52. Localio et al., *supra* note 50, at 248.

53. See David M. Studdert et al., *Negligent Care and Malpractice Claiming Behavior in Utah and Colorado*, 38 MED. CARE 250 (2000).

54. See WEILER ET AL., *supra* note 37, at 75. Note, however, that this phenomenon does not necessarily lend support views about greedy personal injury lawyers and vexatious plaintiffs. “[I]t is more likely due to the fact,” Weiler argues that “that (previously ill) patients and their lawyers have a difficult time identifying in advance valid claims that demonstrate that something went wrong in treatment.” Paul C. Weiler, *Fixing the Tail: The Place of Malpractice in Health Care Reform*, 47 RUTGERS L. REV. 1157, 1162 (1995).

55. Richard Abel, *The Real Tort Crisis—Too Few Claims*, 48 OHIO ST. L.J. 443, 443-48 (1987).

of severity of injury, not the degree of negligence.⁵⁶

This dysfunctional situation clearly implies that compensation and deterrence objectives are not fully realized by malpractice law.⁵⁷ The claims-negligence mismatch also makes it difficult to understand how there could be any sharp or effective deterrence signal associated with malpractice litigation. Heuristics may play an important, salvaging role. HMPS investigators were surprised to discover that, despite the manifest inaccuracies in general claiming behavior, the malpractice claiming system did appear to command the attention of physicians. Many believed that there was a high probability they would be sued if they negligently injured one of their patients.⁵⁸

However, the only clear evidence of a relationship between malpractice claiming and actual behavioral responses was found at the level of the hospital, and here the important signal was the overall number of medical injuries, not the number of medical injuries actually due to negligence.⁵⁹ This finding intimated that institutions may best be positioned to channel the liability threat and experience toward injury-reduction strategies, an argument made persuasively by several legal commentators⁶⁰ and one that resonates with contemporary organizational theories of safety.⁶¹ Overall, HMPS investigators did not interpret their findings about the dynamics of litigation as supporting the need for ongoing reliance on individually targeted tort litigation to ensure about patient safety.⁶²

II. HMPS TODAY: THE NEED FOR VALIDATION

Why does the HMPS require validation? The most obvious reasons stem from market transitions in the United States. The HMPS studied medical injuries connected to hospital stays in 1984. The ensuing sixteen years have seen tumultuous change in the health care arena. Two changes are particularly troubling to the interpretability of HMPS findings today. One is the emergence of managed care as a force in American medicine. The penetration of managed care in New York in 1984 was minimal. Managed care's rapid rise began in the

56. See Troyen A. Brennan et al., *Relation Between Negligent Adverse Events and the Outcomes of Medical Malpractice Litigation*, 335 N. ENG. J MED 1963 (1996).

57. For a discussion of the obstacles to effective deterrence created by haphazard claiming behavior, see David M. Studdert & Troyen A. Brennan, *Deterrence in a Divided World: Medical Malpractice Law in an Era of Managed Care*, 15 BEHAVIORAL SCI. & THE LAW 21, 26-27 (1997).

58. See Ann G. Lawthers et al., *Physicians' Perceptions of the Risk of Being Sued*, J. HEALTH POL., POL'Y & L. 463, 464 (1992).

59. See Troyen A. Brennan, *The Role of Regulation in Quality Improvement*, 76 MILBANK QUARTERLY 709, 714-16 (1998).

60. See Kenneth S. Abraham & Paul C. Weiler, *Enterprise Liability and the Evolution of the American Health Care System*, 108 HARV. L. REV. 381, 381 (1994); William M. Sage et al., *Enterprise Liability for Medical Malpractice and Health Care Quality Improvement*, 20 AM. J.L. & MED. 1, 17-18 (1994).

61. See JAMES REASON, *HUMAN ERROR* (1990).

62. See WEILER ET AL., *supra* note 37, at 139-149.

late 1980s, not only in New York but also in many regions of the country, and within several years had taken root as a new way of life in the practice of medicine.⁶³ The other market shift concerns proprietary medicine. New York had no for-profit sector of hospital care in 1984. By the early 1990s, for-profit institutions were well established in many markets around the United States, including those in New York.⁶⁴ Thus, managed care and for-profit medicine, and the points of intersection between these two phenomena, have largely transformed the health care industry that existed before 1990. No period of change in American medicine has been more dramatic.⁶⁵ Consequently, as any good student of health services research would point out, there are serious doubts about how representative and relevant the HMPS findings are for modern systems of health care delivery and financing.

It must also be acknowledged that New York has always been a unique state in terms of its health policy and litigation environment.⁶⁶ The Department of Health effectively exerted what was in effect "all-payer" control over reimbursement from the late 1970s until the late 1990s. Complex reimbursement formulae meant that Medicaid patients, and even the uninsured, enjoyed greater access to services in New York than their counterparts in other states. Moreover, any study of New York hospitals must be significantly influenced by the unique health demands and care systems of New York City. Large impoverished areas of the city require teaching hospitals that are heavily subsidized by Medicare graduate medical education funds. The influence of these teaching hospitals is much more pronounced than that of the relatively small tertiary care centers in other states. With regard to litigation, New York is distinctive in ways that could potentially affect the negligence-claims relationship: it is heavily populated, ranks among states with the highest per capita concentrations of lawyers, and is renowned for having consistently high rates of malpractice litigation.⁶⁷ In sum,

63. See generally WALTER A. ZELMAN & ROBERT A. BERENSON, *THE MANAGED CARE BLUES AND HOW TO CURE THEM* (1998); James C. Robinson, *Health Care Purchasing and Market Changes in California*, HEALTH AFF., Winter 1995, at 117; James C. Robinson & Lawrence P. Casalino, *Vertical Intergration and Organizational Networks in Healthcare*, HEALTH AFF., Spring 1996, at 7; C.B. Sullivan & T. Rice, *The Health Insurance Picture in 1990*, HEALTH AFF., Summer 1991, at 104-15.

64. See ZELMAN & BERENSON, *supra* note 63, at 112-15; Gary Claxton et al., *Public Policy Issues in Nonprofit Conversions: An Overview*, HEALTH AFF., Summer 1997, at 9; Robert Kuttner, *Columbia/HCA and the Resurgence of the For-Profit Hospital Business (Part II)*, 335 NEW ENG. J. MED. 446, 449-50 (1996); Jack Needleman et al., *Hospital Conversion Trends*, HEALTH AFF., Summer 1997, at 187;.

65. See TROYEN A. BRENNAN & DONALD M. BERWICK, *NEW RULES: REGULATION, MARKETS, AND THE QUALITY OF AMERICAN HEALTH CARE* 151-74 (1995).

66. See Michael S. Sparer, *Nothing Exceeds Like Success: Managed Care Comes to Medicaid in New York City*, 77 MILBANK QUARTERLY 205, 205-23 (1999).

67. It is noteworthy that these same distinctive features apply to California, the only other state from which comprehensive data on injuries and claims have emerged. For data on attorney concentration, see AMERICAN BAR ASSOCIATION, *MEMBERSHIP RANKING BY STATE* (Aug. 1997).

a number of state-specific factors raise further doubts about whether the findings from New York in 1984 can be generalized to the rest of the United States today.

Issues of generalizability aside, a series of recurring questions have arisen about aspects of the HMPS itself. First, with regard to identification of medical injuries, a number of critics have pointed out that the reliability of judgments concerning injury and negligence are less than stellar.⁶⁸ We hypothesized that one important reason for this was that the HMPS had six different directors of the record review. Each conducted their own training programs in different geographic locations. Fragmented reviewer supervision training may well have had a deleterious effect on the reliability of the reviewer judgments in New York.

Second, questions have persisted about the extent of the gap identified between malpractice claims and medical injuries in the HMPS. Investigators reviewing the records of malpractice insurers have found both that a large proportion of the claims appear to be valid and that independent evaluations of negligence generally accord with decisions about compensation.⁶⁹ We have reservations about whether such evaluations really qualify as independent when made by insurers. Nonetheless, the fact remains that the weight of most other malpractice claims analysis suggests a smaller mismatch between claims and negligence than was identified in the HMPS.⁷⁰

Third, the task of collecting data on malpractice claims in New York proved to be particularly challenging. One obstacle was the volatile malpractice environment in New York in 1984. As many as twenty different companies were

For historical claims rates, see U.S. GENERAL ACCOUNTING OFFICE, MEDICAL MALPRACTICE: SIX STATE CASE STUDIES SHOW CLAIMS AND INSURANCE COSTS STILL RISE DESPITE REFORMS, PUB. NO. GAO/HRD-87-21 (Dec. 1986.)

68. See, e.g., RICHARD ANDERSON, AN EPIDEMIC OF MEDICAL MALPRACTICE? A COMMENTARY ON THE HARVARD MEDICAL PRACTICE STUDY, 27 CIVIL JUSTICE MEMORANDUM (1996), available at <http://manhattan-institute.org/html/cjm_27.htm> (visited July 24, 2000). See also Troyen A. Brennan et al., *Reliability and Validity of Judgments Concerning Adverse Events Suffered by Hospitalized Patients*, 27 MED. CARE 1148 (1989); A. Russell Localio et al., *Identifying Adverse Events Caused by Medical Care: Degree of Physician Agreement in a Retrospective Chart Review*, 125 ANN. INTERNAL MED. 457 (1996). Critics questioning the rates of injuries in New York can also point to the experience of Australian investigators who recently estimated the incidence of injuries in Australia. Using methodology that was very similar to that of the Medical Practice Study, the Australians reported an adverse event rate of over 15%. See Ross M. Wilson et al., *The Quality in Australian Health Care Study*, 163 MED. J. AUST. 458 (1995). The fact that similar methods in another set of investigators hands could produce four-fold differences in injury raised concerns about the viability of results in all studies using the HMPS methods.

69. See Taragin et al., *supra* note 15, at 782; Michelle J. White, *The Value of Liability in Medical Malpractice*, HEALTH AFF., Fall 1994, at 75, 79-80.

70. Note, however, that the discrepancy between the HMPS and previous studies referred to here relates only to the issue of the legitimacy of claims made; only HMPS quantified underclaiming.

underwriting malpractice insurance in New York in 1984.⁷¹ Several went into receivership over the next four years; others merged or were acquired by larger organizations. Such market instability raises significant questions about how comprehensive the review of malpractice claims could have been. A related complication—although one that is certainly not peculiar to New York, then or now—is the long tail on claims resolution.⁷² Fifty percent of the claims analyzed in the HMPS were closed more than 5.5 years after the (alleged) date of the injury and twenty-five more than 7.5 years out.⁷³ After ten years, approximately ten percent of claims still had not closed.⁷⁴ This considerable lag frustrates efforts to understand malpractice claiming behavior.

Fourth, the methods for identifying the costs of injury in New York were based on survey data.⁷⁵ Five to six years elapsed between the date of injury and interviews, in which a sample of patients, or their surviving dependents, were asked about health status and services utilized in the intervening period.⁷⁶ While the gap served the investigators' interests in the gathering information on the full repercussions of injury, it also necessitated reliance on the long-term recall of individuals who had suffered adverse events. Recall biases are a well-documented phenomenon in epidemiological research.⁷⁷

Fifth, HMPS investigators did not have the tools to estimate the cost of different compensation models, or compare these costs to those of the tort system. Consequently, assessments of the economic feasibility of alternative schemes, such as "no-fault" compensation, were crude.⁷⁸ Investigators simply compared the total costs of medical injury to estimated costs of the malpractice system, with some minor modifications, to account for administrative expenses associated with dispensing compensation in a no-fault system.⁷⁹

En mass, this set of defects and unanswered questions is very serious. Before policymakers could reasonably be expected to rely on the HMPS findings, we believed it was necessary to validate the study. In bringing the medical injury statistics up do date, we sought states that differed markedly from New York, both regionally and in terms of their demographic mix. Another important criterion was the existence of a mature health care industry, including a managed care and for-profit hospital presence. To simplify and improve the study of malpractice litigation, we also hoped to find states with relatively stable, monopolistic indemnity insurance markets.

71. See HARVARD MEDICAL PRACTICE STUDY, *supra* note 30, at 7-10 to 7-13.

72. See *id.* at 7-13.

73. See WEILER ET AL., *supra* note 37, at 68.

74. See *id.*

75. See *id.*

76. See Johnson et al., *supra* note 41, at 2488.

77. See HENNEKENS & BURING, *supra* note 9, at 35.

78. WEILER ET AL., *supra* note 37, at 97-109.

79. See *id.* at 106-09.

III. STUDY ORIGINS

In 1995, the Robert Wood Johnson Foundation, under the auspices of an initiative led by Robert Berenson, provided us with a grant to undertake a study similar to the HMPS in Utah and Colorado. We worked closely with the legislatures and dominant physician insurers in these two states. Collaborators provided us with an unprecedented level of access to hospital data systems and malpractice claims. In collecting and analyzing these data, we re-deployed the basic methods of the HMPS, making several design changes and running repairs in places where we thought significant deficiencies existed.

We recently reported results from the Utah-Colorado Medical Practice Study ("UCMPS") in the medical literature.⁸⁰ However, we have not previously published a comprehensive overview of our findings. The remainder of this Article summarizes our main analyses and results and identifies some of the key policy implications of the UCMPS.

Before turning to that summary, however, a brief word about the political framework in which the study evolved may be helpful. Our interests in conducting the UCMPS extended beyond a desire to validate the HMPS findings. Convinced by the results of the HMPS that a no-fault system of compensation for medical injuries presented a superior alternative to the tort regime, we sought collaborators who might be interested proceeding with no-fault trials. Two remarkable individuals joined us in this effort.

At the time the study commenced, K. Mason Howard was the President of the Colorado Physicians' Insurance Company ("COPIC"), the major physician insurer in Colorado. Over years of experience with the malpractice system, he formed the view that a no-fault compensation program for medical injuries held out the promise of significant improvement on the status quo. Howard mobilized COPIC's support behind the Colorado portion of the study, and sparked the interest of nearly all of the key players in that state, including physician groups. Elliott Williams was the architect of the Utah portion of the study. One of the most experienced malpractice litigators in Utah, Williams had read extensively on alternatives to tort litigation, and proceeded to convince many health care leaders in his state that a trial of no-fault compensation was possible. Without the persistence and insight of Howard and Williams, the UCMPS would not have occurred.

In both Utah and Colorado, we met with legislators and health policy opinion leaders in 1994 and 1995. Over the next four years we worked on empirical and theoretical aspects of no-fault design in order to inform the policy debate. We also assisted in preparing draft legislation that outlined a statutory framework for a no-fault system of compensation.⁸¹

80. See Studdert et al., *supra* note 53; Eric J. Thomas et al., *Costs of Medical Injuries in Colorado and Utah in 1992*, 36 INQUIRY 255 (1999) [hereinafter Thomas et al., *Costs of Medical Injuries*]; Eric J. Thomas et al., *Incidence and Risk Factors for Adverse Events and Negligent Care in Utah and Colorado in 1992*, 38 MED. CARE 261 (2000).

81. As originally envisioned by the study consortia, the shift toward no-fault compensation

Unfortunately, enthusiasm for such large-scale tort reform had waned by spring 1998. The policy focus had clearly shifted to the uninsured and consumer protection issues in managed care. Thus, the current system remains intact today, replete with secrecy about malpractice claims and arbitrary divisions between risk management, injury prevention and general quality improvement activities. But despite the fact that UCMPS results have not (yet) affected the organization structure of the tort system in Utah and Colorado, they do provide a third, population-based estimate of the incidence, types, and costs of iatrogenic injury, and the best estimates to date on the economic feasibility of a no-fault alternative for medical injury compensation.

IV. RESULTS OF THE UTAH-COLORADO MEDICAL PRACTICE STUDY

A. The Health Burden of Medical Injury

The UCMPS essentially replicated the methods used in the HMPS. Our validation goals demanded that the pool of injuries detected in the mountain states be directly comparable with those from New York. As we have noted, however, the reliability of judgments by record reviewers—both adverse event and negligence determinations—was a major focal point of methodological critiques that followed release of the New York findings.⁸² Drawing upon knowledge gained from work in the interim on “inter-rater reliability”⁸³ and ongoing analyses of the New York experience, we made several modifications to the review process. Most notably, reviewer-training practices were revamped and we instituted a series of quality checks on physician-reviewers’ judgments.

Like the HMPS, sampling work was focused at two levels: the hospitals and the records themselves. There were 112 eligible hospitals in the two states of which thirteen were selected in Utah and fifteen in Colorado. The group selected consisted of two major teaching hospitals (one from each state) and eight minor teaching hospitals (two from Utah and six from Colorado). Four, for-profit hospitals, from each state were also included. From among all discharges in calendar year 1992 at these hospitals, we then sampled 15,000 medical records—5000 in Utah in 10,000 in Colorado.

The medical records were sampled randomly. However, the guiding objectives of UCMPS meant that it was not appropriate to select participating hospitals in a purely random manner. Rather, we sought to load the hospital sample with institutions that would be expected to play key roles in the development of a no-fault insurance plan in each state. Nonetheless, our

was to proceed differently in each state. In Utah, the scheme would be introduced incrementally, beginning with several large hospitals. Colorado was to move more rapidly toward statewide replacement of tort with no-fault, and the participation of patients and physicians was to be mandatory, although some “grand-fathering” was recognized as necessary to accommodate claims relating to injury dates that preceded the effective date of no-fault legislation.

82. See ANDERSON, *supra* note 68.

83. E.g., Localio et al., *supra* note 68.

sampling design preserved the opportunity to “up-weight” results to produce the kind of statewide totals that had attracted so much interest in New York. Moreover, several mitigating factors allowed us to honor basic statistical rules of representativeness with the participating hospitals and to avoid sampling bias. First, as had been done in New York, we classified all eligible hospitals into strata based on their size, location, type of ownership, and whether or not they were teaching hospitals. At least one hospital from each stratum was then invited to participate in UCMPS. Second, none of the invited hospitals refused to participate. Third, we had no prior knowledge of adverse event rates in any of the eligible hospitals.

We made few alterations to the nurse component of the two-stage review process used in New York. Teams of nurses scanned all records searching for one of nineteen different referral criteria. These criteria encapsulated common markers of injury, such as the occurrence of unexpected events during the hospital stay or unplanned readmissions.⁸⁴ The same screening criteria had been used in the HMPS and demonstrated high reliability and validity.⁸⁵

On the other hand, the physician review procedures underwent two significant modifications. First, the training procedures were streamlined and consolidated. Only two investigators, Dr. Thomas and Dr. Brennan, trained the physician-reviewers; this was carried out in a single series of sessions in both states. Thus, to the extent diffuse reviewer training programs introduced variation into the New York findings, it was largely eliminated in Utah and Colorado.

Second, we designed a series of targeted, quality control strategies for the physician review based on knowledge gained during the HMPS about aspects of the process that were associated with unreliable judgments. One strategy addressed “outlier” reviewers. Much of the disagreement between reviewers in the HMPS was shown to have occurred among physicians who had markedly low and high adverse event detection rates.⁸⁶ Accordingly, physicians whose adverse event detection rate was two or more standard deviations below or above the mean for reviewers in their state had their charts re-examined by the investigators. If ten percent or more of the records classified as adverse events by the original reviewer were found not to fit the study definition of adverse events, all of the charts of the offending reviewer were re-assigned for fresh review.

Another quality control strategy involved investigator verification. By inspecting a clinical summary of each adverse event identified in record review, investigators checked to ensure it met the study definition of an adverse event. False positives were eliminated. A similar process was undertaken to verify

84. The longitudinal nature of the medical records allowed nurses and physician-reviewers to make this type of inquiry. However, one methodological limitation of the study is that an adverse event marker such as unplanned readmission was not observable if the patient returned to a different hospital or to an outpatient facility.

85. See Localio et al., *supra* note 50, at 245-46.

86. See Localio et al., *supra* note 68, at 462.

negligent adverse events, although investigators also had some opportunity here to address false negatives. Because the adverse event determination delineated the pool of cases eligible for reviewers' subsequent judgments about negligence,⁸⁷ physician and attorney members of our team were able to comb that pool of injuries to ensure that none had been overlooked as having been due to negligence.⁸⁸

Our final strategy was aimed at testing the general reliability of the review process. It involved re-review of a random sample of 500 records referred by nurses to physicians. The re-review showed eighty-four percent agreement among reviewers.

Figure 1⁸⁹ overviews the results from the review process. We completed review of 4943 (98.9%) of the 5000 sampled records in Utah and 9757 (97.6%) of the 10,000 records in Colorado. Of these records, Utah nurse reviewers referred 854 records (17.2%) for physician review and their counterparts in Colorado referred 2014 records (20.1%). Physicians reviewed ninety-eight percent of the referred records. The rest were categorized as missing.

The profile of patients included in our study closely resembled the general population of patients discharged from each state's hospitals in 1992. For example, the mean age of the patients whose records we reviewed was 38.9 years; the mean age of all patients discharged from Colorado and Utah hospitals was 38.2 years. These results help to confirm that our sampling technique achieved representativeness, at least across key sociodemographic characteristics.

Physician-reviewers identified a total of 169 adverse events in Utah and 418 adverse events in Colorado.⁹⁰ When these totals are up-weighted to the state populations, they yield estimates of 5614 adverse events among hospitalized patients in Utah in 1992, and 11,578 in Colorado. We estimated an adverse event rate of 2.9% in both states, a remarkable similarity considering that medical records were reviewed by completely different teams of physicians in each state. In Utah, 828, or 32.6%, of the adverse events were judged due to negligence, whereas in Colorado the figures were 3179 and 27.5% respectively.

For purposes of exploring types of adverse events we pooled the results.

87. Use of adverse event criteria is an appropriate and conservative method for delineating candidate negligent adverse events because "causation" and the presence of substantive injury, the crux of the adverse event judgment, are also pivotal criteria in the legal definition of negligence. KEETON ET AL., *supra* note 35. The other key component of that definition, evidence that the injury was due to substandard care, was initially addressed by reviewers, and then revisited by investigators.¹

88. This iterative process bears some resemblance to that used to decide the issue of negligence in court, wherein multiple physician testimonies are weighed. Moreover, a 10-year follow-up of the Harvard Medical Practice Study found that, in all but three of 46 litigated cases, reviewers' judgments of negligence correlated closely with expert assessments subsequently made by insurers. See Brennan et al., *supra* note 56, at 1967.

89. See Figure 1, *infra*.

90. See Figure 1, *infra*.

Table 1⁹¹ shows the up-weighted figures for each leading type of event, and the proportion of injuries that involved negligence and permanent disability. The most prevalent injury type was adverse events connected to surgery, accounting for approximately half (44.9%) of adverse events across both states.⁹² Nearly one third of these were the result of technical complications in the operation. Only 16.9% of surgical adverse events involved negligence. Approximately the same proportion resulted in permanent disability.

Drug-related adverse events were the next most prevalent group. They accounted for more than one-third of the balance of injuries. The four most common classes of drugs involved were antibiotics (24.9%), cardiovascular agents (17.4%), analgesics (8.9%), and anticoagulants (8.6%). Strikingly, more than one third of all drug-related adverse events detected were due to negligence. The mistakes that led to these instances of substandard care included prescription of the wrong drug (20.9%), prescription of the wrong dose (7.9%), and prescription of a drug to a patient with a known allergy to that drug (5.7%).⁹³

Compared to findings from New York, iatrogenic death was a relatively rare occurrence in the mountain states. Only 6.6% of adverse events resulted in death, although the death rate was slightly higher (8.8%) among negligent adverse events. In total, 439 patients hospitalized in Utah and Colorado in 1992 died due to negligent care; another 160 victims of negligence suffered grave or major disability.

These mortality statistics certainly shock. They confirm the existence of an epidemic of potentially preventable iatrogenic death in the United States. However, they present a considerably less bleak picture than emerged from New York eight years earlier. When extrapolated to the United States population, iatrogenic deaths detected the HMPS suggested there were nearly 200,000 deaths a year due to adverse events, whereas the UCMPS suggests no more than 65,000 deaths. The difference widens when it comes to negligent adverse events: 120,000 negligent deaths nationwide versus less than 25,000, extrapolating from the HMPS and the UCMPS rates respectively. This fivefold difference in deaths due to negligent care is particularly striking.

There are several explanations. First, by the time we initiated the UCMPS we had become aware of a growing literature suggesting that severity of injury tended to inappropriately color judgments about quality of care.⁹⁴ Therefore, during reviewer training, we dealt specifically with the need to differentiate the injury severity from the judgment of causation or negligence. Second, the standard of medical care may simply have been better in Colorado and Utah in

91. See Table 1, *infra*.

92. For a detailed analysis of the surgical adverse events identified in UCMPS, see Atul A. Gawande et al., *The Incidence and Nature of Surgical Adverse Events in Colorado and Utah in 1992*, 126 SURGERY 66 (1999).

93. These percentages relate to the proportion of drug-related events due to negligence, not drug related adverse events in general.

94. See, e.g., Rodney A. Hayward et al., *An Evaluation of Generic Screens for Poor Quality of Hospital Care on a General Medicine Service*, 31 MED. CARE 394 (1993).

1992 than in New York in 1984.⁹⁵ Third, we cannot, of course, rule out the possibility that limitations in the methods we used, principally chart review, at least partly explain disparities between the two studies.⁹⁶

But despite the differences noted above, the story that emerges from comparison of results of the HMPS and UCMPS is chiefly one of tremendous similarity. Beginning with the overall adverse event rate itself—there is actually no statistically significant difference between the proportion of hospital discharges that give rise to adverse events (3.7% versus 2.9%)—inter-study analyses across a variety of different measures show that the UCMPS findings essentially reinforce those from the HMPS. For example, the proportion of operative adverse events is remarkably stable between studies. Slightly more than one-half of all negligent adverse events in both studies occurred in the emergency department, and a very high proportion of all adverse events attributed to emergency physicians were judged to be due to negligence (70.4% in New York and 52.6% in Utah and Colorado). This is likely a result of the challenging environment in the emergency department in which critical human factors, such as uncertainty, changing plans, high work load, and multiple concurrent tasks are brought to bear on health professionals in the emergency room.

However, not all studies of medical injury mirror the UCMPS and HMPS findings. In August 1995, to much public clamor, the Australian government announced results from the Australian Quality in Health Care Study (“QAHCS”). Ross Wilson and colleagues estimated that 16.6% of admissions to Australian hospitals were associated with adverse events, fifty-one percent of which were considered preventable.⁹⁷ Having consulted with QAHCS investigators throughout their study, these results surprised us because the Australians also drew a sample from 1992, identical in size to UCMPS, and then closely modeled their methods, as we had, on those developed during HMPS. Yet they detected nearly six times more adverse events than the UCMPS did. A closer analysis of the respective study methods and samples showed that several relatively straightforward adjustments were necessary to allow direct comparability.⁹⁸

95. For a discussion of this possibility, see Troyen A. Brennan, *The Institute of Medicine Report on Medical Errors - Could It Do Harm?*, 342 N. ENG. J. MED. 1123, 1124 (2000).

96. For a recent critique of questionable role of reviewer consensus, see T.P. Hofer et al., *Discussion Between Reviewers Does Not Improve Reliability of Peer Review of Hospital Quality*, 38 MED. CARE 152 (2000).

97. See Wilson et al., *supra* note 68, at 458, 470. QAHCS investigators did not make determinations about negligence. Instead, physician-reviewers were asked to determine whether each adverse event detected was “preventable,” defined as “an error in management due to failure to follow accepted practice at an individual or system level.” “Accepted practice” in this definition was taken to be “the current level of expected performance of the average practitioner or system that manages the condition in question.” *Id.* at 461.

98. See Eric J. Thomas et al., *A Comparison of Iatrogenic Injury Studies in Australia and America II: Context, Methods, Casemix, Population, Patient and Hospital Characteristics* (unpublished manuscript, 2000).

However, such adjustments still only reduced the disparity to a fourfold difference.⁹⁹

Our results are also quite different from those obtained by Lori Andrews and colleagues in Illinois.¹⁰⁰ Using ethnographic measurement techniques to track adverse events occurring in "real time," they found rates of 17.7% in one university teaching hospital. However, fairly major differences between sampling and other aspects of the methodologies used in the Andrews study and the UCMPS limit their comparability.¹⁰¹

In summary, the UCMPS produced results similar to its predecessor in New York. Approximately, three percent to four percent of hospitalizations appear to give rise to adverse events. Insofar as these adverse events are the results of errors in care-givers behavior, they follow similar patterns. In other words, not much appears to have changed from 1984 to 1992 in terms of the role of human factors in medical injury causation. Together, the two studies provide overwhelming evidence that the burden of iatrogenic injury is large, enduring, and an innate feature of hospital care in the United States.

B. The Relationship Between Malpractice Claims and Medical Injuries

An important component of the UCMPS, like the HMPS the before it, was to link the medical injuries identified in record review to malpractice claims. Thanks to the more stable claims environment in the mountain states, the task was significantly less onerous than had been the case in New York. Claims files were more detailed and readily accessible, and there were several dominant indemnity insurers. In Utah, we collected malpractice claims data from the state's major commercial insurer, the Utah Medical Indemnity Association, and two important self-insurers, Intermountain Health Care and the University Hospital. Together these entities are responsible for close to eighty percent of physician liability insurance policies written in Utah annually.

The malpractice insurance market in Colorado is dominated by the Colorado Physicians' Insurance Company ("COPIC"), which covers approximately three-quarters of insured physicians. One other commercial insurer, The Doctors' Company, and two self-insured institutions, Kaiser Permanente and the University Hospital, write most of the remaining policies. All four entities participated in our study which allowed us access to claims data from more than ninety percent of the physician liability insurance market in Colorado. This unprecedented level of cooperation by insurers, some of them business competitors, was largely due to the advocacy efforts of Howard and Williams.

As in the HMPS, we used computer-matching techniques to identify patients

99. *See id.*

100. *See* Lori B. Andrews et al., *An Alternative Strategy for Studying Adverse Events in Medical Care*, THE LANCET, Feb. 1, 1997, at 309, 309.

101. Chief among these differences is the fact that Andrews and colleagues focused on surgery—the area in which we had detected the highest rates of adverse events in the general hospital population we examined.

from the medical record review who filed malpractice claims during or after 1992.¹⁰² In addition to name, we used a range of demographic characteristics to test for matches, including date of birth, date of alleged injury, hospital, admission date, and discharge date. We began with fairly generous assumptions about the possibility of coincident identities. For example, ranges on birth dates were used, as were multiple phonetic variations on each name. We then moved through a process of eliminating false positives by closely inspecting each candidate match. Finally, after narrowing the candidate list to those sampled patients who had filed claims, a physician investigator compared the information in the relevant claims file to the record review documentation to ensure that the claim actually related to an episode of care examined during the record review.

We identified eighteen malpractice claims arising from records that we had reviewed, eight in Utah and ten in Colorado. Seven of the eighteen matched claims involved allegations of negligence relating to surgical procedures. Six claims involved allegations of a failure to diagnose or treat. Of the remaining five claims, three related to perinatal medical management and two related to miscellaneous primary care treatments.

The low number of matches was anticipated, given the relatively small sample size of both medical records and claims in the UCMPS, as compared to the HMPS. It meant that statistically significant differences between members of the matched group and the full sample of patients we studied in chart review were impossible to detect. Nonetheless, as Table 2¹⁰³ shows, the two groups appeared to diverge along several important dimensions: the matched or claimant group was slightly younger (mean of thirty-six years of age versus forty years of age years), a larger proportion was covered by private health insurance (seventy-percent versus fifty-two percent), none was uninsured, and only one was a Medicare beneficiary. As one would expect, adverse event and negligent adverse event rates were higher among the matched group than in the general medical population. (These were, after all, the select few patients who were motivated to sue.) However, the negligence rates, as determined *ex ante* by UCMPS record reviewers, were not as high as many might demand from an efficient, effectively functioning malpractice system. Of the eighteen matches, only four involved identifiable instances of negligence. Moreover reviewers had not even flagged the occurrence of an adverse event in ten of them.¹⁰⁴

102. For details of the software packages used and the algorithms that underlie the matching techniques, see generally M.A. Jaro, *Probabilistic Linkage of Large Public Health Data Files*, 14 STATISTICS IN MEDICINE 491 (1995); T.B. Newman & A.N. Brown, *Use of Commercial Record Linkage Software and Vital Statistics to Identify Patient Deaths*, 4 J. AMER. MED. INFORMATICS ASSOC. 233 (1997).

103. See Table 2, *infra*.

104. Eight of the 10 claims adjudged not to involve an adverse event on record review did not meet fundamental adverse event criteria. In the two cases that did meet these fundamental criteria, but were then adjudged not to be adverse events, physician reviewers found only slight to modest evidence (score of two) that management caused the injury in question. Of the eight claims judged to involve adverse events, reviewers were virtually certain that an adverse event had

Table 3¹⁰⁵ summarizes the relationship between negligent adverse events and claims across the four states in which population-based analyses of malpractice have been conducted over the past twenty-five years. The statistics shown in the table combine results from the record review and matching studies with information on claims volume in each state, and tell a remarkably consistent story about the claims-negligence dynamic.

The figures in Row 1 set the scene by illustrating the markedly different litigation environments that prevailed in the four states at the time of each study. California and New York were experiencing frenetic claims activity, whereas the situation in Utah and Colorado was relatively calm at the time of the medico-legal measurements in UCMPS. The high litigation rates on the East and West coasts are no doubt partly attributable to the medical malpractice "crises" that unfolded in the mid-1970s and mid-1980s. However, California and New York are distinctive in other ways that could affect claims, incidence of negligence, and negligence-claims dynamics: both are heavily populated, they are among the states with the highest lawyer to population ratios,¹⁰⁶ and both are renowned for having consistently high rates of malpractice litigation.¹⁰⁷

Row 2 of Table 3¹⁰⁸ restates findings from chart review: it illuminates that fact that volume of litigation has no significant bearing on the incidence of malpractice. Nor do litigation rates appear to affect accuracy of claiming, as shown in Row 4. However, fewer claims and steady negligence rates must mean that, what we have called, the malpractice gap narrows. Row 3 shows that the degree to which instances of substandard care outstrip claims that allege the same is less in Utah (ratio of 5.1 to 1) and Colorado (ratio of 6.7 to 1) than it was in the high litigation states of New York (ratio of 7.6 to 1) and California (ratio of 10.0 to 1). Taken together, the data in Table 3¹⁰⁹ suggest that the dysfunctional characteristics of the medical malpractice system—most notably, its *adequacy* and its *accuracy*—have a resilience over time and across jurisdictions when viewed through an epidemiological lens.

Two caveats are in order. First, regardless of the similarity in methods between the studies that generated these comparative data, any conclusions about inter-temporal and cross-regional trends must be tempered by an acknowledgment that these are not truly longitudinal data. Because we have no evidence that the disconnections observed between negligent injury and claiming behavior existed in the mountain states in earlier periods, we are unable to infer that it is insensitive to overall rates of claims, and stable across time and regions

occurred in five (score of six), they found strong evidence in two (score of five), and one was a borderline call (score of four). In the four claims judged negligent adverse events, reviewers either found strong evidence or were virtually certain of their judgment.

105. See Table 3, *infra*.

106. See AMERICAN BAR ASSOCIATION, *supra* note 67.

107. See UNITED STATES GENERAL ACCOUNTING OFFICE, MEDICAL MALPRACTICE: SIX STATE CASE STUDIES SHOW CLAIMS AND INSURANCE COSTS STILL RISE DESPITE REFORMS (1986).

108. See Table 3, *infra*.

109. See Table 3, *infra*.

of the country. However, our findings certainly lend plausibility to the argument that the findings from Utah, Colorado, New York, and California are a reasonably reflection of the situation in other states.

Second, just as claims or process focused studies can say little about the relationship between the epidemiology of negligence and claims, a population-based study like the UCMPS is not specifically designed to evaluate the performance of the malpractice system once a claim is initiated.¹¹⁰ There is some evidence to suggest that the malpractice system deals appropriately with the claims it receives.¹¹¹ Viewed as an omniscient perspective above the hospital floor, however, news of those system strengths may, to misquote the Gershwin brothers, sound like a sore case of "nice recompense if you can get it."

Which victims of negligence might express this sentiment, and what prevents them from "naming" their loss, "blaming" a provider or institution for it, and "claiming" compensation?¹¹² These questions led directly to the second set of analyses in our study of malpractice litigation. The raw comparison in Table 2¹¹³ between the claimants in our sample and the general study population hinted at important socio-demographic differences, especially in the age and insurance coverage. But to tease out the true association between whether or not individuals claim and their socio-demographic characteristics, it is necessary to use multivariate regression techniques.¹¹⁴

To understand what characteristics were associated with claiming in the HMPS, investigators had undertaken multivariate comparison of the fifty-one claims matched to chart reviews in that study with a specially selected group of "controls" from the larger study sample.¹¹⁵ But despite having nearly three times more claimants to work with than the UCMPS, the meager sample size limited the kind of analyses that were possible. Specifically, HMPS investigators could not measure factors that influenced claiming behavior *among patients who had suffered negligence* because only eight of the fifty-one fell into this group. In order to gather information on this population, and circumvent the sample size

110. See White, *supra* note 69, at 75-87

111. For an excellent summary of these studies, see MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING THE MYTHS ABOUT JURY INCOMPETENCE, DEEP POCKETS, AND OUTRAGEOUS DAMAGE AWARDS (1997). But cf. Brennan et al., *supra* note 56, at 1963-67.

112. William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y 631, 635-37 (1980-81).

113. See Table 2, *infra*.

114. Regression analysis is a statistical approach widely used in the social sciences to explain or predict the variability of a "dependent" variable (in this case, a patient's claimant status) using information about one or more "independent" variables" (e.g. age, gender, race etc.) Multivariate regression refers to analyses that use three or more independent variables. The principal advantage of regression techniques is that they allow researchers to examine the relation between a dependent variable and each independent variable while simultaneously "holding constant" the effect of the other independent variables. DAVID G. KLEINBAUM ET AL., APPLIED REGRESSION ANALYSIS AND OTHER MULTIVARIATE METHODS 36-40 (1988).

115. Helen R. Burstin et al., *Do the Poor Sue More?*, 270 JAMA 1679 (1993).

problem, we pursued a new analytical approach. We sought to take advantage of the wealth of information gathered in the UCMPS on 157 patients who were found to have suffered negligence but had not sued by comparing them to individuals who had sued for injuries allegedly suffered in 1992. Information on the latter group was obtained directly from insurers.

The differences hinted at in comparison of the matches with the general study population were borne out in multivariate analysis (Table 4).¹¹⁶ Predictably, people who did not claim despite having suffered negligence were more likely to have suffered minor injury (odds ratio ["OR"] 6.3; ninety-five percent confidence interval ["CI"], 2.7 to 14.9). Non-claimants were also much more likely to be Medicare recipients (odds ratio [OR], 3.5; ninety-five percent confidence interval [CI], 1.3-9.6), Medicaid recipients (OR, 3.6; ninety-percent CI, 1.4-9.0), seventy-five years or older (OR, 7.0; 95% CI, 1.7-29.6), and low income earners (OR, 1.9; ninety-five percent CI, 0.9-4.2).

As a result of work done in the HMPS, Burstin and colleagues had suggested that, when negligently injured, the elderly and the poor were less likely to sue for negligence.¹¹⁷ Other studies have yielded conflicting answers to this question¹¹⁸ and there is anecdotal evidence of a popular perception that the reverse is true, a perception which may well influence medical practice patterns.¹¹⁹ Our study lends weight to Burstin's suspicions.

How can the strong association between the sociodemographic factors we identified and underclaiming be explained? Financial incentives provide one explanation. Economic theories of tort law suggest that individuals who are poor, or who do not earn income, whether or not they are poor, will be less likely to sue.¹²⁰ Malpractice litigation is rarely initiated without attorney involvement, hence a prospective litigant's ability to claim typically hinges on an attorney's willingness to take on their case. Because the financial return accruing to plaintiffs' attorneys in tort cases is generally linked to the size of the award through contingency fees,¹²¹ and lost income typically forms a significant component of malpractice awards, a plaintiff's lawyer would tend to maximize

116. See Table 4, *infra*.

117. See Burstin et al., *supra* note 115, at 1679.

118. See generally U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, DO MEDICAID AND MEDICARE PATIENTS SUE PHYSICIANS MORE OFTEN THAN OTHER PATIENTS? (1992); U.S. GENERAL ACCOUNTING OFFICE, PUB. NO. GAO/HRD-87-55, MEDICAL MALPRACTICE: CHARACTERISTICS OF CLAIMS CLOSED IN 1984, at 27 (1987); OPINION RESEARCH CORPORATION, AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, HOSPITAL SURVEY ON OBSTETRICAL CLAIM FREQUENCY BY PATIENT PAYER CATEGORY (1988); Mark Sager et al., *Do the Elderly Sue Physicians?*, 150 ARCH. INTERNAL MED. 1091 (1990).

119. See LuAnn Dubay et al., *The Impact of Malpractice Fears on Cesarean Section Rates*, 18 J. HEALTH ECON. 491 (1999).

120. See generally WILLIAM H. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987); STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW (1987).

121. See generally HERBERT M. KRITZER, THE JUSTICE BROKER: LAWYERS AND ORDINARY LITIGATION (1990).

his own income by choosing to act for clients with ongoing sources of income.¹²² (Indeed, the costs of costs of bringing a claim may simply exceed the damages recoverable.) The elderly and the poor are particularly unlikely to generate income. Moreover, any income they do generate is less likely to be "lost" because of a decline in physical capacity occasioned by negligent injury. In addition, the size of any award to elderly patients will usually be constrained by their shorter life expectancy. Some elderly may also have trouble recognizing that they have suffered a medical injury, much less substandard care.

Other factors that we did not account for in our statistical analysis may also play a role in defining the non-claimant group. For example, a lower level of education, an inability to discern the occurrence of a negligent injury, a shorter life-expectancy, and the absence of third-party advice are all factors potentially related to both the distinctive characteristics of members of the non-claimant group we identified and their failure to bring suit. Regulatory barriers may also restrict the opportunity for poor patients to secure legal representation. For example, federal law prevents legal services attorneys, often the only attorneys available in poor neighborhoods, from taking on "fee generating" work such as malpractice, except in extenuating circumstances.¹²³ In addition, older, poorer patients may be simply more reluctant to sue than wealthier patients.

Whatever the true underlying cause of patients failure to claim despite having suffered negligence, the critique leveled at the efficacy of the current malpractice system is the same: factors other than individual merit appear to play a strong role in determining who uses the malpractice system and who receives compensation from it. These concerns should be understood in the context of our more general findings that claims lag well behind the incidence of negligent injury, and the two are seldom connected in the current system.

We believe these results generally validate the findings of the HMPS. As noted earlier, our biggest fear was that the New York data, gleaned from a somewhat unstable tort environment, would not be reflective of state malpractice litigation. This appears not to be the case. A significant gap exists between medical injuries and malpractice litigation, although it is probably not as large today as it was in the mid-1980s.

How generalizable are our measures of malpractice litigation to other states? By the end of the second tort crisis in the late-1980s, a mature industry of malpractice litigation had emerged. The number of plaintiffs' firms engaged in malpractice litigation in most metropolitan areas had stabilized. Also, most defense attorneys retained by insurance companies had ten to fifteen years of experience in this type of litigation. Over the course of the 1990s, we have seen the same sets of defendants' and plaintiffs' attorneys battling over similar cases.

122. See John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 678 (1986); Barry R. Furrow, *Medical Malpractice and Cost Containment: Tightening the Screws*, 36 CASE W. RES. L. REV. 985, 1022 (1985-86).

123. See 45 C.F.R. § 1609 (1999); Molly McNulty, *Are Poor Patients Likely to Sue for Malpractice?*, 262 JAMA 1391, 1391-92 (1989).

Claim rates have changed relatively little, although the average size of verdicts and settlements is increasing at a moderate rate.¹²⁴ This industry stability suggests to us that the UCMPS findings are likely to reflect the prevailing situation in most states.

C. Economic Burden of Medical Injury

Health service researchers faced with identifying the costs of medical injuries in the general population have two options.¹²⁵ They may survey injured individuals and use information about ongoing disability, health care utilization, and the range of restrictions a person's injury has imposed to calculate costs attributable to the injury. Alternatively, they may ask experts to estimate costs based on their experience and available information about the injured individual and the nature of the injury itself.

Using the former approach, the HMPS reported that adverse events among patients hospitalized in New York in 1984 led to \$3.8 billion in total health care costs.¹²⁶ This figure implied total national costs of slightly more than fifty billion dollars in 1984.¹²⁷ After carefully weighing a mix of considerations, including residual reservations from the HMPS about potential recall biases, resource constraints, and the ethical complexities associated with re-contacting patients with knowledge in hand both about injuries they had suffered and causes of those injuries, we chose to use experts' judgments in the UCMPS.

We began by creating a summary of each adverse event was created by having two physician-investigators, Thomas and Brennan, review the eleven-page form onto which physician reviewers had transcribed information about both the patient and the injury. These physician review forms included a narrative of the adverse event, various sociodemographic details about the patient, including occupation type, and a rating of severity of the disability made by the physician reviewers and confirmed by investigators.¹²⁸ To calculate disability, investigators first reviewed the adverse event summary and estimated the patient's disability, time off work, and lifetime health care utilization based on their own expert

124. See PHYSICIAN INSURER'S ASSOCIATION OF AMERICA, CLAIM TREND ANALYSIS (1997) (unpublished data on file with authors).

125. A third option may potentially exist for studies aimed at measuring injury costs in "closed" populations, such as workers compensation systems: investigators may gather information on lost wages and medical costs from administrative databases. For a methodology that approaches this technique see, e.g., MARK A. PETERSON ET AL., COMPENSATING PERMANENT WORKPLACE INJURIES: A STUDY OF THE CALIFORNIA SYSTEM (1997). Given the diffuse nature of administrative data sources that would generally collect cost information on injuries, however, this approach is infeasible in studies of injuries in general populations.

126. See Johnson et al., *supra* note 41, 2489.

127. See Thomas et al., *Costs of Medical Injuries*, *supra* note 80, at 255.

128. We used the used the National Association of Insurance Commissioners Severity of Injuries Scale. See NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, MALPRACTICE CLAIMS: FINAL COMPILATION (M. Sowka ed., 1980).

judgment. Health care utilization estimates included number of inpatient days, outpatient visits, home health visits, physical and occupational therapy sessions, nursing home stays, and medication and medical supplies likely to be occasioned by the injury, as distinct from whatever other underlying illnesses or diseases the patient may have been suffering at the time. Next, four experienced malpractice claims adjusters from Utah and six from Colorado reviewed the case summaries and made their own estimates on each of the same measures. The investigators and adjusters then met to discuss the results and reach a consensus where there were disagreements.

Disability and health care utilization estimates were converted into dollars by applying unit costs drawn from a range of sources. The Census Bureau's Current Population Survey ("CPS") was used to identify mean annual income for each injured patient, taking into account their age bracket, gender, and occupation.¹²⁹ In some cases, the latter was missing from the physician review form so only gender and age were used. We emulated real earnings growth by inflating income at an annual rate of 0.7%.¹³⁰

When the injuries suffered were permanent and disabling, or the patient died due to an adverse event, we estimated lost income up to the expected age of death or seventy-five, assuming that earnings would be negligible after the age of seventy-five. Life expectancy was estimated by returning to CPS data. Some adjustments were made for life expectancy, given that many patients had adverse events as part of other co-morbid illness. The study investigators jointly estimated life expectancy for those individuals we doubted would recover sufficiently to reach average life expectancy. We also controlled for labor participation rates by using CPS data on labor force participation. Fringe benefits were assumed to be equal to twenty-seven percent of gross income and were added if a patient suffered permanent disability or death.¹³¹

In addition to lost wages, we estimated lost household production to account for the fact that some adult patients would be unable to perform household duties such as childcare, cooking, and cleaning because of their injuries.¹³² Here, we used a replacement costs method, calculating the amount it would have cost to hire someone else to perform the task. We relied on the precedent of Utah's no-fault automobile insurance system to value such household production at twenty dollars per day, a paltry sum, but consistent with per diem figures used in other independent research in this area.¹³³

129. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1994 (114th ed. 1994).

130. See ECONOMIC REPORT OF THE PRESIDENT 332, tbl. B-45 (1996).

131. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYER COSTS FOR EMPLOYEE COMPENSATION (1992).

132. In the case of adverse events resulting in death, it was also necessary to apply some of the finer points of labor economics and make a deduction from the household production figure; the deduction represents the amount that deceased individuals would have spent on personal expenses, such as food and clothing, had they not died.

133. See, e.g., W. KEITH BRYANT ET AL., COLLEGE OF HUMAN ECOLOGY, CORNELL

Health care costs were more straightforward to estimate. We derived average payments for inpatient days from health insurers in each state. Physician fees were based on a survey of physicians in the western United States.¹³⁴ Pharmaceutical costs could be estimated by using the average wholesale price for drugs, obtained from the Red Book of pharmaceutical prices.¹³⁵ We employed Medicaid average per patient payments to nursing homes for those patients for whom admission to long-term care was projected.¹³⁶

Each of these key expenditure items, lost wages, lost household production, and health care costs, were then incorporated into an economic consequences model. We multiplied the population weight of each patient, determined by the sampling scheme, times the economic consequences calculated for that patient's adverse event. We discounted to 1996 dollars for future costs, using a real interest rate of 2.75%. Finally, data for the two states were combined in the interests of achieving more stable estimates.

The total economic consequences of all adverse events estimated to have occurred in Utah and Colorado in 1992 were \$661.9 million, as shown in Table 5.¹³⁷ A subset of all adverse events judged to have been preventable accounted for nearly one-half of this total, or \$308.3 million.¹³⁸ Postoperative complications and adverse drug events were the most expensive type of adverse events, with the former giving rise to \$232 million in costs and the latter, \$213.7 million.

The largest share of the total was accounted for by health care costs. More than \$348 million was spent on treatment resulting from adverse events suffered in hospitals in the two states in 1992. (Lost household wages were the second highest component, accounting for \$160.9 million.) Surprisingly, one-half of these health care costs were attributable to nursing home care expenditures. Inpatient hospital costs absorbed the next largest portion (forty-one percent), followed by non-intensive care bed days (thirty-one percent) and intensive care (ten percent). In total, the health care costs of adverse events in Utah and Colorado that accrued in outpatient settings, inclusive of nursing home costs,

UNIVERSITY, THE DOLLAR VALUE OF HOUSEHOLD WORK (1992).

134. See Mark Crane, *What Your Colleagues Are Charging*, 69 MED. ECON. 190, 191-217 (1992).

135. See MONTALVE, RED BOOK: MEDICAL ECONOMICS DATA (1992).

136. See HEALTH CARE FINANCING ADMINISTRATION, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, PUB. NO. 03354, STATE DATA BOOK ON LONG-TERM CARE PROGRAM AND MARKET CHARACTERISTICS (1994).

137. See Table 5, *infra*.

138. Using similar methods to those used by Wilson and colleagues in the Australian study of adverse events, see Thomas et al., *supra* note 98, Thomas and Brennan rendered a judgment about the preventability of each adverse event. This process was separate from and subsequent to identification of the adverse events themselves in record review. Like negligence, and the adverse event judgment itself, preventability judgements were recorded on a six-point confidence scale, see *supra* note 33 and accompanying text. Similar implicit judgment methodologies have been used by other researchers to judge preventability of adverse events. See, e.g., David W. Bates et al., *Incidence of Adverse Drug Events and Potential Adverse Drug Events*, 274 JAMA 29 (1995).

were nearly twice as large as the inpatient costs. This finding is all the more remarkable when one considers that adverse events suffered in the inpatient setting were the focus of the UCMPS.

When extrapolated to the thirty-three million discharges from American hospitals in 1992, our estimates put annual costs of adverse events nationwide at approximately thirty-eight billion dollars. This is smaller, although not greatly dissimilar, to the fifty billion dollar figure derived from patient interviews in the HMPS.¹³⁹ Of course, some of this difference is driven by the slightly higher adverse event rate detected in New York. When adjusted to 1996 dollars and recalculated with UCMPS adverse event rates, the New York data suggest annual costs of \$147 per capita; the UCMPS estimates are \$132 per capita. Some of the residual differential between these figures is explained by the greater severity of injuries in New York. However, the proximity of the two estimates is noteworthy in light of the fact that the studies used two quite different methodologies.

One lesson from our cost analyses concerns the importance of looking beyond inpatient health care costs in estimating the effects of iatrogenic injury. Our estimates suggest that more than sixty percent of total health care costs may be generated outside the hospital. This, in turn, suggests that other studies of adverse event that have focused exclusively on inpatient costs—for example, those undertaken in the field of drug-related adverse events¹⁴⁰—are likely to have missed the full economic implications of the medical injuries they examined. Even UCMPS estimates of outpatient care are appropriately interpreted as a lower bound on these costs for two reasons. First, as noted above, inpatient adverse events were the unit of analysis in our study. Those injuries that transpired exclusively in the outpatient setting would not have been captured. Second, we used average Medicaid payments in each state as an indicator of costs; such payments do not consider out-of-pocket spending or private insurance costs associated with the injuries.

Our findings also provide some targets for improvement. The costliest areas appear to be surgical adverse events, adverse drug events, and those adverse events due to incorrect diagnoses. Front-end expenditures devoted to preventing medical error in these areas could yield savings overall, although precise estimates of the cost trade-offs involved are desperately needed. Thus, the next phase of research into the economic consequences of medical injury may well belong to cost-effectiveness analysts. We believe the input of researchers in this field may well be the key to hastening market-driven quality improvement efforts. But even without the benefit of such analyses, the economic research to date suggests that, as a whole, American hospitals are almost certainly underspending in their efforts to prevent adverse events. More than one-half of the adverse events we detected were judged preventable. If such prevention occurred, it would relieve the U.S. health care system of nearly twenty billion dollars in

139. See Thomas et al., *Costs of Medical Injuries*, *supra* note 80, at 260-61.

140. See David W. Bates et al., *The Costs of Adverse Drug Events in Hospitalized Patients*, 277 JAMA 277 (1997); David C. Classen et al., *Adverse Drug Events in Hospitalized Patients Excess Length-of-Stay Extra Costs Attributed Mortality*, 277 JAMA 301 (1997).

health care costs, or two percent of present health care expenditures.¹⁴¹ A greater investment in prevention strategies is crucial.

D. The Persistent Question: How to Improve Compensation of Medical Injuries?

Many commentators have suggested that alternative approaches to compensating medical injuries should be considered in the United States.¹⁴² An administrative system, somewhat similar to current workers' compensation regimes, that does not make compensation contingent on proof that fault or negligence caused the injury in question, has long been heralded as the best candidate.¹⁴³ But many concerns have been raised about the notion of a pure "no-fault" system, the principal one being that such a system would be inordinately expensive to operate in his country.¹⁴⁴ To some extent, our own findings in the HMPS and the UCMPS about the size of the medical injury problem, and associated costs, may be interpreted as bolstering this argument. Recalling the grand total reported in the previous section, a price tag of more than \$650 million would substantially exceed the resources currently channeled into the medical malpractice systems in Utah and Colorado. According to our best estimates, and those of our collaborators in Utah and Colorado, malpractice premiums paid in those states in 1996 totaled approximately \$60 million and \$100 million

141. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1997, Table 155.

142. See generally DANZON, *supra* note 2; Joshua Fruchter, *Doctors on Trial: A Comparison of American and Jewish Legal Approaches to Medical Malpractice*, 19 AM. J.L. & MED. 453 (1993); Clark C. Havighurst & Laurence R. Tancredi, "Medical Adversity Insurance"—A No-Fault Approach to Medical Malpractice and Quality Assurance, 51 MILBANK Q. 125 (1973); Michael A. Jones, *Medical Injury—The Fault with No-Fault*, 83 PROF. NEG. (1987); Jeffrey O'Connell, *No-Fault Insurance for Injuries Arising from Medical Treatment: A Proposal for Elective Coverage*, 24 EMORY L.J. 21 (1975); Geoffrey Palmer, *The Ninth Monsanto Lecture: The Design of Compensation Systems: Tort Principles Rule, O.K.?*, 29 VAL. U. L. REV. 1115 (1995); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—and Why Not?*, 140 U. PA. L. REV. 1147 (1992); Carolyn Sappideen, *No Fault Compensation for Medical Misadventure—Australian Expression of Interest*, 9 J. CONTEMP. HEALTH L. & POL'Y 311 (1993); Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 558 (1985).

143. See generally Paul C. Weiler, *The Case for No-Fault Medical Liability*, 52 MD. L. REV. 908 (1993).

144. See Elliott M. Abramson, *The Medical Malpractice Imbrolio: A Non-Adversarial Suggestion*, 78 KY. L.J. 293, 304 (1989-1990); Randall R. Bovbjerg, *Medical Malpractice: Research and Reform*, 79 VA. L. REV. 2155 (1993) (reviewing WEILER ET AL., *supra* note 37); Jerry L. Mashaw & Theodore R. Marmor, *Conceptualizing, Estimating, and Reforming Fraud, Waste, and Abuse in Health Care Spending*, 11 YALE J. ON REG. 455, 486-87 (1994); Michael J. Saks, *Medical Malpractice: Facing Real Problems and Finding Real Solutions*, 35 WM. & MARY L. REV. 693, 704-05 (1994) (reviewing WEILER ET AL., *supra* note 37); Steven D. Sugarman, *1499 Doctor No*, 58 U. CHI. L. REV. 1499-1516 (1991) (reviewing WEILER, *supra* note 13).

respectively.¹⁴⁵

However, this kind of cost comparison is far too simplistic. Medical malpractice litigation compensates lost wages and some of the other losses we accounted for in our economic consequences calculations. But certain medical costs and lost household production are not always addressed in tort awards. Conversely, our totals did not figure in some losses, most notably pain and suffering, that the medical malpractice system includes in awards. But more important than adjustment of these line items is the broader recognition that it is both naïve and misleading to assess the merits of no-fault by imagining a scheme that would attempt to compensate the universe of iatrogenic injury. No such scheme has ever been seriously proposed—indeed, administrative practicalities would render it inoperable.

Given the policy imperatives that motivated the UCMPS, evaluation of the economic feasibility of a practical, workable no-fault scheme was a key study goal from the outset. HMPs investigators had completed some interesting theoretical analyses of the feasibility of a no-fault program for compensating medical injuries, but they did not undertake a detailed assessment of its design or affordability.¹⁴⁶ The leading contribution to design work in medical no-fault systems comes from Bovbjerg and Tancredi, who developed an innovative set of administrative compensation criteria. Designated compensable events (“DCEs”), and their later manifestation, accelerated compensation events (“ACEs”), are criteria used for the purpose of efficiently deciding the question of compensation with certain types of injury.¹⁴⁷ Building on Bovbjerg and Tancredi’s ideas, we investigated design options for a more encompassing scheme. We were attracted to the Swedish Patient Injury Compensation Fund.¹⁴⁸ Sweden has successfully operated the Fund, an administrative compensation program, for the past two decades. The criteria used do not contemplate all adverse events as compensable injuries. Rather, they incorporate consideration of the “avoidability” of the

145. See David M. Studdert et al., *Can the United States Afford a "No-Fault" System of Compensation for Medical Injury?*, 60 LAW & CONTEMP. PROBS. 1, 31 (1997).

146. See WEILER ET AL., *supra* note 37, at 104-09.

147. DCEs are predetermined categories of medical injuries that are identified by medical experts as statistically preventable given appropriate management. Proposals for systematic use of such devices have been termed “selective no-fault”: on the one hand, only those medical injuries selected for coverage by professional judgment are included. ABA COMMISSION ON MEDICAL PROFESSIONAL LIABILITY, DESIGNATED COMPENSABLE EVENT SYSTEM: A FEASIBILITY STUDY 8 (1990); Randall R. Bovbjerg et al., *Obstetrics and Malpractice: Evidence on the Performance of a Selective No-Fault System*, 265 JAMA 2836, 2836 (1991); Havighurst & Tancredi, *supra* note 142; Laurence R. Tancredi & Randall R. Bovbjerg, *Rethinking Responsibility for Patient Injury: Accelerated Compensation Events, A Malpractice and Quality Reform Ripe for a Test*, 54 LAW & CONTEMP. PROBS. 147, 149 (1991).

148. See Carl Oldertz, *The Patient, Pharmaceutical and Security Insurances*, in COMPENSATION FOR PERSONAL INJURY IN SWEDEN AND OTHER COUNTRIES 51 (Carl Oldertz & Eva Tidefelt eds., 1998).

injury—a notion we have previously described in detail.¹⁴⁹ Avoidability essentially turns on whether the physicians could reasonably have acted in a way that would have averted the injury at issue. Thus, it closely approximates the preventability judgments to which we subjected all adverse events detected in the UCMPS as part of the economic analyses.¹⁵⁰

We hypothesized that designing a no-fault program around compensation criteria that incorporated an avoidability/preventability component would demarcate a generous, yet manageable, body of medical injuries as eligible for compensation. In conceptual terms, the size of the pool of injuries contemplated lies between all adverse events (i.e., pure no-fault) and negligent adverse events (i.e., the malpractice system).¹⁵¹ We further hypothesized that compensating all avoidable adverse events would not be prohibitively expensive. It was anticipated that the costs would in fact be comparable to those of the tort system because expenditures associated with the increased number of awards in our model would largely be offset by administrative savings and the use of slightly more modest awards than those parceled out in litigation.

Some stakeholders in Utah and Colorado indicated at the outset that a model that did not include pain and suffering would be politically untenable. Most administrative compensation schemes do not address pain and suffering, primarily because they do not rely on juries, and quantum of non-economic losses has largely been understood as a jury determination.¹⁵² Previous analysis of jury verdict data by Bovbjerg and colleagues provided us with an opportunity to obtain “average” non-economic awards made to plaintiffs within specific age and disability strata.¹⁵³ To include consideration of the costs associated with other components of a reasonable compensation package—including lost wages, lost household production, and health care costs—we replicated calculations from our economic consequences analyses.

Use of the Swedish avoidability criteria yielded estimates of the total compensation budget, including projected administrative costs, which were significantly lower than the total injury costs obtained in our earlier analysis of the economic consequences of medical injury. Costs are further decreased if an eight-week disability (or “deductible”) period is added as a prerequisite to accessing compensation¹⁵⁴ In Utah, the total for compensating the Swedish

149. Studdert et al., *supra* note 145, at 104-09.

150. We had found that approximately one-half of the adverse events were preventable, roughly double the number that could be attributed to negligence. *See supra* note 138.

151. *See* Studdert et al., *supra* note 145, at 8.

152. *See* MICHAEL L. BROOKSHIRE & STAN V. SMITH, *ECONOMIC/HEDONIC DAMAGES: THE PRACTICE BOOK FOR PLAINTIFF AND DEFENSE ATTORNEYS* 161-66 (1990); Steven P. Croley & Jon D. Hanson, *The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 HARV. L. REV. 1785, 1837-41 (1995).

153. Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling Pain and Suffering*, 83 NW. U. L. REV. 908, 937 (1989).

154. A deductible or threshold period eliminates relatively minor injuries from the pool of injuries eligible for compensation. It also has the benefit of channeling available funds to victims

compensable events with an eight-week disability period, inclusive of pain and suffering, lost wages and household production, and health care costs was \$76.8 million.¹⁵⁵ In Colorado, the costs were almost exactly \$100 million.

Table 6¹⁵⁶ compares of the affordability of candidate no-fault schemes by comparing their cost to estimates of the cost of the current medical malpractice system in each state. In Utah, one approach to compensation under consideration during the UCMPS proposed use of Swedish compensable events, a \$100,000 cap on pain and suffering, a four week disability period, no household production, and sixty-six percent wage replacement. The estimated costs of such a program, after addition of administrative and birth injury costs, would be \$54.9 million. In Colorado, the preferred model also involved use of Swedish compensable events, an eight-week disability period, and did not include household production. Our calculations suggested total system costs of \$102.4 million for Colorado.

Thus, our cost estimates for the Swedish-style systems in Utah and Colorado compare favorably to the tort system: at \$54.9 million, the Utah model would cost approximately the same as the tort system, while at eighty-two million dollars, the Colorado model would actually be expected to reduce the costs of compensating medical injury by eighteen million to twenty-eight million dollars annually. To keep these estimates in perspective, it is worth noting that in 1992, our study year, total personal health care expenditures were \$3.8 billion in Utah and \$9.4 billion in Colorado.¹⁵⁷

Table 7¹⁵⁸ shows the "ratcheting" effects of removing household production and pain and suffering, items that some policy makers may believe are dispensable. The table also shows how the number of beneficiaries shifts with the selection of different deductible periods. For example, the number of patients eligible for compensation in Colorado decreases from 5919 to 1604 with use of a four-week deductible period, and to 973 with an eight-week period. Proportionally similar decreases occur in Utah when these time thresholds are applied.

More generally, Table 7¹⁵⁹ illustrates the modular nature of the various components of the compensation package. Policymakers could use these methods

whose losses that are least likely to be covered by other sources of coverage, such as sick pay for time lost from work. See Theodore F. Haas, *On Reintegrating Workers' Compensation and Employers' Liability*, 21 GA. L. REV. 843, 891-95 (1987). In addition, we have previously noted that application of a disability threshold can be expected to confer administrative, as well as financial, benefits. Disentangling the harmful consequences of the original illness from those attributable to the medical injury itself is a problem that is most acute in the immediate post-treatment period. See WEILER ET AL., *supra* note 37, at 101-03.

155. These figures are in discounted 1996 dollars. For a detailed explanation of these calculations, see Studdert et al., *supra* note 145, at 26 (Tab. 2).

156. See Table 6, *infra*.

157. See Katherine R. Levit et al., *State Health Expenditure Accounts: Building Blocks for State Health Spending Analysis*, 17 HEALTH CARE FIN. REV. 201, 231 Tab. 11 (1995).

158. See Table 7, *infra*.

159. See *id*.

to project the costs of high priority components in a compensation plan and to test the budgetary impact of adding or eliminating other components. Decisions about the trade-offs involved across dimensions—the number of patients eligible for compensation, for example, and the importance of household production to awards—could play out in public and legislative debates around appropriate uses of scarce resources. Of course, such decisions go to the central problem of distributive justice in compensation.

Estimates such as those made the UCMPS inject some operational realities into the debate about distributive justice. The view often espoused by plaintiffs' advocates is that when a medical injury occurs because of the negligence of a physician or hospital, it should be compensated and compensated generously. As we have seen, however, the present system comes nowhere close to realizing this ideal. It is quite haphazard and fails to compensate many worthy individuals. Moreover, our analyses demonstrate that distributive justice is further undercut by systematic differences along socio-demographic lines in the enjoyment of what compensation the malpractice system does provide.

But even when inefficiencies and inequities in the compensation process are reduced, the central problem of distributive justice remains: how should scarce resources be allocated?¹⁶⁰ An administrative compensation scheme cannot circumvent this difficult question. But it would allow stakeholders to agree upon eligible injuries and obtainable remedies in advance, which should promote equity, predictability and efficiency in the distribution process. In other words, an important feature of such a system would be to make more explicit the criteria used for the allocation and distribution of resources used to compensate medical injury. At some level, explicit rationing must enter the fray, in the form of decisions to exclude household production losses, for example, or exclusion of injuries that caused disability lasting less than eight weeks. But we believe this approach is preferable to the implicit rationing that occurs by virtue of the fact that many victims of medical injury cannot or do not obtain compensation for their injuries from the Byzantine tort system.

Another advantage of a no-fault approach that warrants mention is that, if carefully designed, it could eliminate much of the adversarial nature of medical malpractice litigation.¹⁶¹ We were astonished to find that physicians in Sweden actively participate in sixty to eighty percent of the claims that are made, helping their patients complete and file the relevant forms.¹⁶² Compensation appears to be culturally ingrained there as a matter of social justice, not as an admission of provider guilt or negligence. At its best, the injury compensation process in Sweden supports, rather than conflicts, with the health care professional's

160. See, e.g., AMARTYA SEN, *INEQUALITY REEXAMINED* (1995); Arti Kaur Rai, *Rationing Through Choice: A New Approach to Cost-Effectiveness Analysis in Health Care*, 72 IND. L.J. 1015 (1997).

161. See Bovbjerg & Sloan, *supra* note 19, at 71-72. See generally David M. Studdert et al., *The Jury Is Still in: Florida's Birth-Related Neurological Injury Compensation Association After a Decade*, 25 HEALTH POL. POL'Y & L. 469 (2000).

162. See Studdert et al., *supra* note 145, at 6.

commitment to the patient and to excellence in medical practice.

CONCLUSION

The main objectives of the UCPMS were to test the results of the HMPS in a new health care environment and to explore the feasibility of a no-fault system for compensating medical injury. With support from the Robert Wood Johnson Foundation, cooperation from hospitals, physicians and malpractice insurers in Utah and Colorado, and the efforts of numerous collaborators, these objectives were achieved. Overall, the UCPMS lent strong support to the iatrogenic injury rates, economic calculations, and malpractice patterns estimated in New York nearly a decade earlier. The UCPMS findings were no carbon copy, however. For instance, we found significantly lower iatrogenic death rates in Utah and Colorado. We also gained fresh insights into the burden of iatrogenic injury by investigating previously understudied areas, such as the resources devoted to outpatient services to treat the after-effects of adverse events.

The results of our efforts to conceptualize an administrative compensation scheme based on avoidability criteria and project its costs, provide considerable cause for optimism about the feasibility of a no-fault system. Even before our work was complete, however, it was apparent in both states that the enthusiasm of our collaborators would not be sufficient to transform the no-fault initiative into political action. The 1990s had contravened the predictions of some pundits,¹⁶³ failing to produce the sort of malpractice "crisis" experienced in the preceding two decade. Relative stability in malpractice insurance markets appeared to sap legislative interest in large-scale tort reform.

Thus, it is not without some foundation that skeptics may conclude that the true mission of the UCPMS failed; its empirical findings have not been used to inform meaningful policy reform. We prefer to take a longer-term view of the value of the study. It is our hope that when the political winds shift, a probable occurrence given a history of cyclical interest in alternative compensation approaches in the United States,¹⁶⁴ the UCPMS methods and findings stand ready to be used by other policymakers who become interested in no-fault. Ironically, hints of just such a shift have surfaced at the federal level over the past six months. But rather than being borne of dissatisfaction with the malpractice system as a mechanism for compensating injured patients, interest in malpractice alternatives has been invigorated by a spate of media and political attention directed at error in medicine. In particular, the widely-publicized report, *To Err is Human*, issued by the Institute of Medicine in December 1999, appears to have raised the public awareness about the burden of medical error to a new level.¹⁶⁵

163. See Walter J. Wadlington, *A Medical Malpractice Crisis in 1995?: Some Conceivable Scenarios*, 36 ST. LOUIS U. L.J. 897 (1992).

164. See generally Bovbjerg & Sloan, *supra* note 19.

165. See *TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM* (L.T. Kohn et al. eds., 1999). For examples of the media attention that surrounded release of the report, see, e.g., Bob David & Julie Appleby, *Medical Mistakes 8th Top Killer*, USA TODAY, Nov. 30, 1999, at 1A; Ellen

The link between no-fault and error reduction is quite compelling. As the report makes clear, many errors fall into the avoidable category and could be reduced if proper error-prevention strategies are put into place. Although the science of error reduction in medicine is in its infancy and much remains to be learned about what strategies work best and how they should be implemented, it is already clear that attention to individual provider judgment and action, hallmarks of the malpractice system, will not be an important ingredient in solutions.¹⁶⁶ On the contrary, there is a growing sense that this orientation feeds the problem. The most promising possibilities for advancement appear to lie in interventions designed to modify the systems in which medicine is practiced, together with ignition of the sort of professional commitment to error-reduction that has developed in certain areas of the airline industry.¹⁶⁷

In addition, we believe that eliminating the specter of litigation would also remove *the* principal barrier to the free flow of information about medical errors. A centrally maintained registry of avoidable events could be an important source of data for those interested in applying continuous quality improvement and epidemiological techniques to prevent errors. A no-fault compensation authority could assume this function, but it is incompatible with the current structure of the medical malpractice industry. At present, most medical liability insurers maintain their research in a manner heavily geared toward defense objectives. There is no overarching classification scheme and error-related aspects of individual claims are ignored, unless directly related to the question of negligence. Thus, it is virtually impossible to undertake cross-insurer comparisons of medical malpractice claims and no single insurer has a sufficient number of claims to support serious epidemiological analysis. A central registry, maintained with an administrative compensation scheme, would solve these problems. It could also be designed to integrate human factor analysis and other classifications that are helpful to error-prevention technologies and be updated as the science evolves.

This is certainly a very hopeful scenario for the integration of error prevention with an administrative compensation scheme. But an avoidability-based compensation scheme could provide an enormous boost to error reduction efforts by aligning the foci of the compensation and quality improvement systems and centering attention on precisely those injuries that are eradicable.¹⁶⁸

Goodman, *In Hospitals, to Err Is Human, to Fess Up Is Necessary*, BOSTON GLOBE, Dec. 9, 1999, at A23; Robert Pear, *Group Asking U.S. for New Vigilance in Patient Safety*, N.Y. TIMES, Nov. 30, 1999, at A1.

166. See Donald M. Berwick & Lucian L. Leape, *Reducing Errors in Medicine: It's Time to Take This More Seriously*, 319 BRITISH MED. J. 136 (1999).

167. See generally Robert L. Helmreich, *On Error Management: Lessons from Aviation*, 320 BRITISH MED. J. 781; Leape, *supra* note 47. Evidence that progress in reducing the burden of iatrogenic illness lies in these directions has begun to accumulate. See Brennan, *supra* note 94.

168. See Liang, *supra* note 48.

**FIGURE 1. OVERVIEW OF THE RECORD REVIEW
PROCESS IN COLORADO (CO) AND UTAH (UT)**

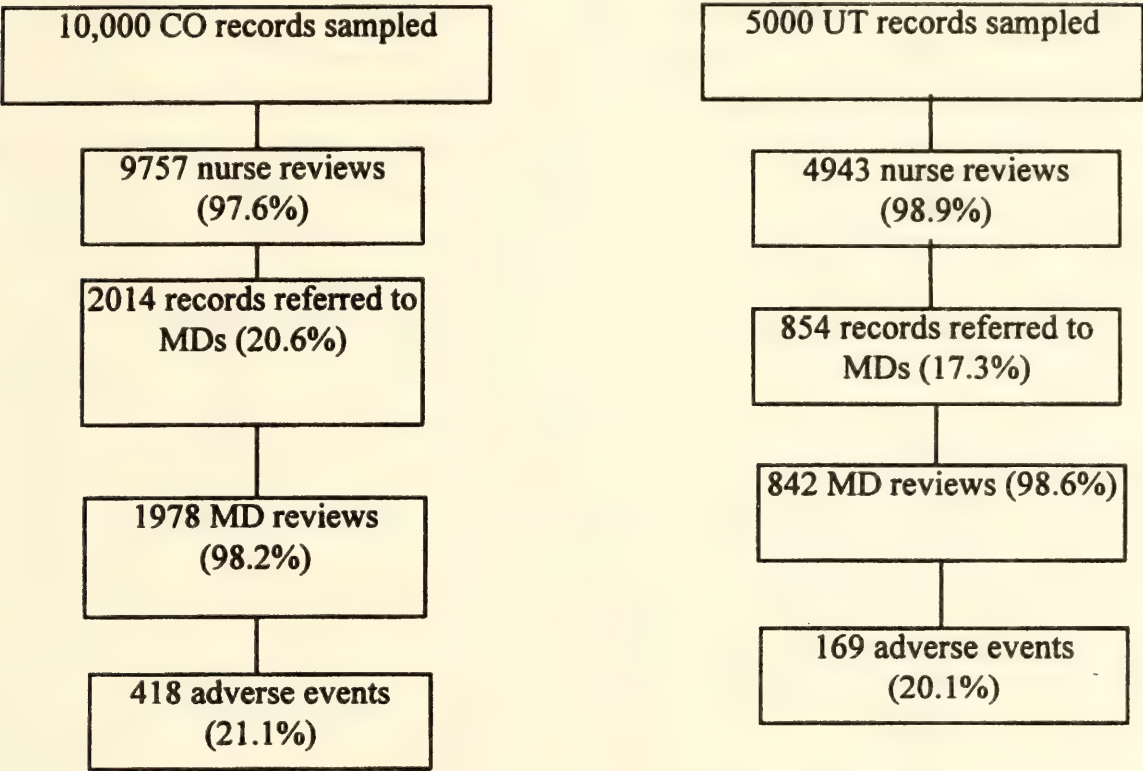


TABLE 1. TYPES OF ADVERSE EVENTS

Type	Adverse Events	(%)*	% of AEs with Negligence
Operative	7715	(44.9)	16.9
<i>Technical</i>	2309	29.9	23.6
<i>Bleeding</i>	1319	17.1	9.8
<i>Wound infection</i>	877	11.4	20.8
<i>Non-wound infection</i>	775	10.0	7.5
Drug	3325	(19.3)	35.1
<i>Antibiotic*</i>	828	24.9	6.8
<i>Cardiovascular agent</i>	579	17.4	38.9
<i>Analgesic</i>	297	8.9	33.3
<i>Anticoagulant</i>	286	8.6	25.1
Medical procedure	2315	(13.5)	15.3
Incorrect or delayed diagnosis	1181	(6.9)	93.8
Incorrect or delayed therapy	736	(4.3)	56.8
Post-partum	620	(3.6)	25.5
Neonatal	532	(3.1)	25.3
Anesthesia-related	226	(1.3)	32.7
Falls	220	(1.3)	65.8
Fracture-related	66	(0.4)	0
Other	256	(1.5)	59.9
Total	17,192		

* Percentages shown for the subtypes of Operative and Drug-related adverse events represent proportions of the total number of adverse events in the relevant category (i.e., 7715 and 3325, respectively)

TABLE 2. DESCRIPTIVE CHARACTERISTICS OF MATCHED AND STUDY SAMPLES

Patient Characteristics	Claimants matched to study sample	Study sample
No. of subjects	18	14,700
Female	10 (55%)	9,077 (61%)
Non-white	3 (16%)	3,197 (22%)
Mean age	36 ± 21	40 ± 27
Median household income	30,000	--
Adverse events *	8 (44%)	587 (4%)
Negligent adverse events *	4 (22%)	161 (1%)
Payer †		
Medicare	1 (5%)	3,767 (26%)
Medicaid	3 (15%)	2,223 (15%)
Uninsured	0 (-)	891 (6%)
Private/other	13 (75%)	7,703 (52%)
Disability ‡		
Minor	1 (25%)	279 (48%)
Significant	5 (62%)	238 (41%)
Major	2 (13%)	49 (8%)

* Statistical difference between matched claimants and study sample at $p<0.05$ level using Fisher's exact and Wilcoxon tests, as appropriate.

† Payer categories may not add to 100% due to missing values.

‡ Adverse events only.

TABLE 3 RELATIONSHIP BETWEEN NEGLIGENT ADVERSE EVENTS AND CLAIMS.

Relationship	Utah 1992	Colorado 1992	New York 1984	California 1976
Claims per 100 physicians per year	7.1	7.3	14.0	17.4
Negligent adverse event rate (per 100 discharges)	0.90	0.80	1.00	0.79
Ratio of negligent adverse events to claims	5.1	6.7	7.6	10.0
Probability claim follows negligent adverse event	2.5%		1.5 %	--

TABLE 4. MULTIVARIATE ODDS OF FAILURE TO CLAIM DESPITE NEGLIGENCE BY SOCIO-DEMOGRAPHIC CHARACTERISTICS (COLORADO, INCIDENT YEAR 1992)

Characteristics	Non-claimants compared to all claimants (<i>n=109 and 256, respectively</i>)
Female	1.4 (0.8-2.6)
Patient age [‡]	
< 18 yrs	1.0 (0.3-3.3)
45 to 64 yrs	1.7 (0.8-3.6)
65 to 74 yrs	2.2 (0.6-7.3)
≥ 75 yrs	7.0 (1.7-29.6) *
Payer [§]	
Medicare	3.5 (1.3-9.6) *
Medicaid	3.6 (1.4-9.0) *
Uninsured	2.0 (0.7-5.8)
Income	
Poor	2.0 (0.8-5.3)
Low income	2.0 (0.9-4.2) †
High income	0.8 (0.3-1.8)
Disability [¶]	
Minor	6.3 (2.7-14.9) *
Significant	1.7 (0.8-3.9)

* $P < 0.05$.

† $P < 0.1$

‡ Reference group was patients aged 18 to 44 yrs

§ Reference group was privately insured

|| Reference group was middle income

¶ Reference group was major disability

**TABLE 5. COSTS OF ADVERSE EVENTS AND PREVENTABLE
ADVERSE EVENTS IN UTAH AND COLORADO
(THOUSANDS, DISCOUNTED TO 1996 DOLLARS)**

	All Adverse Events (%)	Preventable Adverse Events (%)
Health care costs	348,081 (53)	159,245 (52)
Lost wages	160,946 (24)	63,309 (20)
Lost household production	152,862 (23)	85,828 (28)
Total	661,889 (100)	308,382 (100)

TABLE 6
AFFORDABILITY OF PREFERRED NO-FAULT MODELS IN UTAH AND COLORADO
(MILLIONS, DISCOUNTED TO 1992 DOLLARS)

State	Estimates of Preferred No-Fault Models	Current Malpractice System Costs
Colorado	\$ 82.0 [†]	\$ 100-110

* Based on use of Swedish compensable events; \$100,000 cap on pain and suffering; four week disability period; no household production; 66% wage replacement.

[†] Based on use of Swedish compensable events; eight-week disability period; no household production.

TABLE 7
ECONOMIC CONSEQUENCES OF SWEDISH COMPENSABLE EVENTS
(MILLIONS, DISCOUNTED TO 1992 DOLLARS)

	Utah	Colorado
Any Disability	(N=2,940)	(N=5,919)
Total	\$90.90	\$128.88
Less Household Production	\$60.38	\$90.55
Less Household Production and Pain & Suffering	\$27.16	\$38.51
 >4 Weeks Disability	 (N=1,465)	 (N=1,604)
Total	\$82.55	\$84.23
Less Household Production	\$52.42	\$52.99
Less Household Production and Pain & Suffering	\$25.22	\$21.21
 >8 Weeks Disability	 (N=889)	 (N=973)
Total	\$76.78	\$87.44
Less Household Production	\$45.96	\$52.18
Less Household Production and Pain & Suffering	\$20.96	\$19.97

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